(21,406.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 98.

THERESA ARNETT, KATIE READE, ROBERT LEA, MARY BUQUOR, AND AARON H. LEA, APPELLANTS,

vs.

D. M. READE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 23, 1910.

1 Be it remembered, That heretofore, on to wit: on the seventh day of August, A. D.. 1906, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a Transcript of record, in a certain cause therein pending entitled, D. M. Reade, Appellee, vs. Pilar S. de Lea, Appellant, Numbered 1166, which said transcript of record, in said cause, was and is in words and figures following to wit:

2 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. 1166.

D. M. READE, Appellee,
vs.
PILLAR S. DE LEA, Appellant.

Appeal from District Court, Dona Ana County.

Transcript of Record.

Fall & Moore, Moore & Paxton, Las Cruces, New Mexico, Attorneys for Appellee.
Numa C. Frenger, Las Cruces, New Mexico, Attorney for Appellant.

Be it remembered, That on the 25th day of February, A. D. 1905, a Complaint was filed in the office of the Clerk of the District
3 Court of the Third Judicial District of the Territory of New Mexico, within and for the County of Dona Ana, and docketed in the Docket of said Court, which said complaint is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

In the District Court.

No. —.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

Complaint.

The plaintiff D. M. Reade, through its attorneys, Fall & Moore, for cause of action complains and alleges:

I.

That he is the owner of and in the possession of the following described real estate situate, lying and being in the County of Dona

Ana and Territory of New Mexico, bounded and particularly described as follows, to-wit: The northeast quarter of the northeast quarter and the lots numbered one (1), five (5), six (6) and eight of section twenty-four (24) in township twenty-one (21) south, of range one (1) west of New Mexico Meridian, containing one hundred and sixty three acres (163) and fifty eight hundredths of an acre (58), being the same land patented to Adolpho Lea by the United States of America on June 14th, 1893, Homestead entry certificate No. 924: Also lot numbered one (1) of section twenty three (23) and lots numbered two, three, four and seven of section
4 twenty four (24) in township twenty-one (21) south, of range one (1) west of New Mexico Meridian, containing one hundred and forty-four and five hundredths (144.05) acres, being the land patented to Eusebio Tapio by the United States of America on July 30th, 1891, Homestead certificate No. 1679.

II.

That he is credibly informed and believes that the defendant makes some claim adverse to the estate of this plaintiff in and to aforesaid premises and real estate.

Wherefore plaintiff prays that his estate in fee simple be established in the real estate herein above described against such adverse claim of defendant and that defendant be forever debarred from having or claiming any right or title in or to the said premises, adverse to plaintiff, and that plaintiff's title thereto be forever quieted and set at rest. And for all equitable and lawful relief that may seem to the Court just, and his costs in this behalf expended.

(Signed) FALL & MOORE,
Attorneys for Plaintiff.

TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

D. M. Reade, of lawful age being first duly sworn upon his oath deposes and says that he has read the foregoing complaint and is familiar with the facts therein set out and contained; that he is the plaintiff mentioned and set out in said complaint, and knows of his own personal knowledge that the facts and things
5 therein set out and contained are true except as to those facts alleged upon information and belief and as to those he believes them to be true.

(Signed) D. M. READE.

Subscribed and sworn to before me this the 25th Day of Feb., 1905.

[SEAL.] (Signed) N. C. FLINT,
Notary Public.

Which said complaint is endorsed upon the back in words and figures as follows, to-wit:

No. 2586. Territory of New Mexico, County of Dona Ana. In the District Court. D. M. Reade, Plaintiff, vs. Pillar S. de Lea,

Defendant. Complaint. Third Judicial District Court, County of Dona Ana. Filed in my office this 25th day of Feb. 1905. (Signed) William E. Martin, Clerk, By John Lemon, Deputy. Fall & Moore, Las Cruces, N. M., Attorneys for plaintiff.

And thereafter, on the 18th day of March, A. D. 1905,
6 there was filed in the office of the Clerk an Answer, which is in words and figures as follows to-wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

In the District Court, Third Judicial District, within and for the County of Dona Ana.

No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

Answer.

The defendant answers to the complaint, and denies that plaintiff is the owner of the real estate described and set forth in the complaint.

And further answering, defendant alleges:

1. That she was married to Adolpho Lea in December 1851.

2. That since the time of said marriage and up to the time of the death of said Adolpho Lea, they were husband and wife, and that she is now the surviving wife of said Adolpho Lea.

3. That said Adolpho Lea acquired during his life time and during coverture with defendant the real property described in the complaint herein as Lots numbered one (1,) five (5,) six (6) and eight (8,) of section twenty-four (24) in township twenty-one (21) south of range one (1) west of New Mexico Meridian, same having been patented to said Adolpho Lea by the *the* United
7 States of America on June 14th, 1893; that said Adolpho Lea acquired during his life time and during coverture with defendant the real property described in complaint herein as Lot numbered one (1) of section twenty-three (23) and Lots numbered two, three, four and seven of section twenty-four (24) in township twenty-one (21) south of range one (1) west of New Mexico Meridian, by virtue of deed and conveyance from one Eusebio Tapia, on April 6th, 1889.

4. That said Adolpho Lea, husband of this defendant as stated, died on the 23rd day of April, A. D. 1902, in Dona Ana County, New Mexico, intestate and that at the time of his death he was seized in fee simple of the said real estate and property set forth and in said complaint filed herein.

(Signed) N. C. FRENGER,
Attorney for Defendant.

TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

Pillar S. de Lea, of lawful age being first duly sworn, upon her oath deposes and says that she has read the foregoing answer and is familiar with the facts therein set out and contained; that she is the defendant mentioned and set out in said answer, and knows of her own personal knowledge that the facts and things therein set out and contained are true except as to those facts alleged upon information and belief and as to those she believes them to be true.

(Signed) PILLAR S. DE LEA.

8 Subscribed and sworn to before me this the 18th day of March, 1905.

[SEAL.] (Signed) N. C. FRENGER,
Notary Public in and for Dona Ana County, New Mexico.

My commission expires Feb. 1st, 1908.

I, the undersigned, attorney for defendant Pillar S. de Lea in above entitled cause, do certify that I served a true copy of the foregoing answer on Fall & Moore, attorneys for plaintiff in this cause, on this the 18th day of March, by depositing it in the post office at Las Cruces, N. M., securely enveloped, with postage thereon paid, addressed to Fall & Moore, Las Cruces, N. M.

(Signed) N. C. FRENGER,
Attorney for Defendant.

Which said defendant's answer is endorsed upon the back in words and figures as follows, to-wit:

No. 2586. Territory of New Mexico, County of Dona Ana. In the Third Judicial District Court. D. M. Reade, Plaintiff, vs. Pillar S. de Lea, Defendant. Answer of Defendant. Third Judicial District Court, County of Dona Ana. Filed in my office this 16th
9 day of March, 1905. (Signed) William E. Martin, Clerk, By J. F. O'Leary, Deputy. N. C. Frenger, Las Cruces, N. M., Attorney for Defendant.

And thereafter, on the 5th day of April, A. D. 1905, there was filed a Reply, which is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

In the District Court, Third Judicial District, within and for the County of Dona Ana.

No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

Reply.

The plaintiff through Fall & Moore his Attorneys replying to the answer of the defendant, admits that the said Adolpho Lea, husband of the defendant, died on the 23rd day of April, A. D. 1902, in Dona Ana County, New Mexico intestate, but denies at the time of his said death that he was seized in fee simple, or had any interest in, or title to said real estate, set out and described in the complaint and the defendants answer or any part or portion thereof, but alleges the
10 fact to be that for a valuable consideration, the said Adolpho Lea on the — day of April, A. D. 1902, sold, transferred and conveyed all of said land so described in the said complaint of this plaintiff, by a certain Warranty Deed which was recorded on the 6th day of May, 1902, in the office of the Clerk of the Probate Court and ex-officio recorder, in and for Dona Ana County, New Mexico, in Deed Book No. 22 at pages 271 and 272.

(Signed) FALL & MOORE,
Attorneys for Plaintiff.

TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

D. M. Reade, of lawful age being duly sworn, upon oath deposes and says that he has read the foregoing reply and is familiar with the facts therein set out and contained; that he is the plaintiff in the above styled action, and knows of his own personal knowledge that the facts and things therein set out, contained and alleged, are true except as to those facts alleged upon information and belief, and as to those he believes them to be true.

(Signed) D. M. READE.

Subscribed and sworn to this the 5th day of April, 1905.

(Signed) HORTON MOORE,
Notary Public.

Which said plaintiff's Reply is endorsed upon the back in words and figures as follows, to-wit:

11 No. 2586. Territory of New Mexico, County of Dona Ana, in the 3rd Judicial District Court. D. M. Reade, Plaintiff, vs. Pillar S. de Lea, Defendant. Reply. Third Judicial District Court,

County of Dona Ana, Filed in my office this 5th. day of Apr. 1905. (Signed) William E. Martin, Clerk, By John Lemon, Deputy. Fall & Moore, Attorneys for Plaintiff.

And thereafter, on the 5th, day of October A. D. 1905, an Agreed Statement of Facts was filed, which is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

In the District Court of the Third Judicial District in and for the County of Dona Ana.

No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

Agreed Statement of Facts.

The parties to the above entitled cause agree that the fol-
12 lowing facts are the vital facts in the cause, and upon the following agreed statement of facts they agree to submit the cause for a hearing in law:

1. That defendant was intermarried with Adolpho Lea, as set forth in the answer;

2. That defendant and Adolpho Lea were husband and wife and defendant is now the surviving wife of Adolpho Lea, as set forth in the answer;

3. That Adolpho Lea acquired the land in dispute, as set forth in the answer;

4. That Adolpho Lea died intestate at the time and place set forth in the answer;

5. That Adolpho Lea executed and delivered to plaintiff his certain warranty deed of the land in dispute, as set forth in the reply.

(Signed) FALL & MOORE,
Attorneys for Plaintiff.
N. C. FRENGER,
Attorney for Defendant.

Which said Ag-ee- Statement of Facts is endorsed upon the back in words and figures as follows, to-wit:

No. 2586. Territory of New Mexico, County of Dona Ana. In the District Court of said County. D. M. Reade, Plaintiff, vs.
13 Pillar S. de Lea. Agreed Statement of Facts. Filed in my office this 5th day of Oct. A. D. 1905. (Signed) William E. Martin. Clerk. Fall & Moore, Las Cruces, N. M., Attorneys for Plaintiff.

And thereafter, of the 25th day of June, A. D. 1906, there was filed and entered of record in the office of the Clerk a Final Judgment, which is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

In the District Court, Third Judicial District, within and for the County of Dona Ana.

No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

Now on the 25th day of June, A. D. 1906, the above entitled cause comes regularly on for a hearing upon an agreed statement of facts, now on file in this cause, the plaintiff appearing by his attorneys, Moore and Paxton, and the defendant appearing by her attorney, Numa C. Frenger, and an agreed statement of the material facts in the cause having been submitted to the Court by the parties, and argument having been had thereon:

It is considered, ordered, adjudged and decreed that the estate in fee simple of the said plaintiff, D. M. Reade, in the following described tracts of land and real estate, to-wit:

14 The northeast quarter (N. E. ¼) of the northeast quarter (N. E. ¼) and the lots numbered one (1), five (5), six (6) and eight (8) of section twenty-four (24) in township twenty-one (21) south of range one (1) west of New Mexico Meridian, containing one hundred and sixty-three (163) acres and fifty-eight hundredths (.58) of an acre, being the same land patented to Adolpho Lea by the United States of America on June 14th, 1893, Homestead Entry Certificate No. 924; Also lot numbered one (1) of section twenty-three (23) and lots numbered two (2), three (3), four (4) and seven (7) of section twenty-four (24) in township twenty-one (21) south of range one (1) west of New Mexico Meridian, containing one hundred and forty-four and five hundredths (144.05) acres, being the land patented to Eusebio Tapia by the United States of America on July 30th, 1891, Homestead Certificate No. 1679; be and the same is hereby established against the adverse claim of the said defendant, Pillar S. de Lea, and that the said defendant be and she is hereby barred and forever estopped from having or claiming any right or title to the said premises adverse to the said plaintiff, and that the said plaintiff's title thereto be and the same is hereby forever quieted and set at rest, and that the said plaintiff have and recover of and from the said defendant his costs in this behalf incurred and expended, to be taxed by the Clerk, for which let execution issue.

At Las Cruces, New Mexico.

15 (Signed) FRANK W. PARKER, *Judge.*

Which said Final Judgment is endorsed upon the back in words and figures as follows, to-wit:

No. 2586. Territory of New Mexico, County of Dona Ana. In the District Court. D. M. Reade, Plaintiff, vs. Pillar S. de Lea, Defendant. Final judgment. Third Judicial District Court, County of Dona Ana. Filed in my office this 25th day of June, 1906. Wm. E. Martin, Clerk. By John Lemon, Deputy.

And thereafter, on the 14th day of July, A. D. 1906, there was filed in the office of the Clerk A Waiver of Notice of Appeal, which is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

In the District Court, Third Judicial District, within and for the County of Dona Ana.

16 No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

Waiver of Notice of Appeal.

The plaintiff hereby waives notice of application for appeal from the judgment and decree made and rendered in the above entitled cause on the 25th day of June, to the Supreme Court of the Territory of New Mexico.

Dated July 11th, 1906.

(Signed) MOORE & PAXTON,
Attorneys for Plaintiff.

Which said Waiver of Notice of Appeal is endorsed upon the back in words and figures as follows, to-wit:

No. 2586. In the District Court of the Third Judicial District of the Territory of New Mexico, in and for the County of Dona Ana. D. M. Reade, Plaintiff, vs. Pillar S. de Lea, Defendant. Waiver of notice of appeal. Third Judicial District Court, County of
17 Dona Ana. Filed in my office this 14th day of July, 1906. (Signed) Wm. E. Martin, Clerk, By John Lemon, Deputy.

And thereafter, on the same day there was filed in the office of the Clerk, Defendant's Motion and Application for Appeal, which is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

In the District Court, Third Judicial District, within and for the County of Dona Ana.

No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

Defendant's Motion and Application for Appeal.

To the Honorable Frank W. Parker, Judge of the District Court of the Third Judicial District of the Territory of New Mexico, sitting within and for the County of Dona Ana:

Comes now Pillar S. de Lea, defendant in the above entitled cause, and deeming herself aggrieved by the judgment and decree rendered against her, in the above entitled cause, on the 25th day of June, A. D. 1906, respectfully applies for and prays that an appeal be granted her from the said judgment and decree, in all its parts
18 and portions, to the Supreme Court of the Territory of New Mexico, and that a transcript of the records, proceedings and papers upon which said judgment and decree was founded, after due authentication, be sent and transmitted to the said Supreme Court of the Territory of New Mexico; and for the purpose of this appeal, the said defendant tenders herewith her bond for costs, and prays that same be approved by this court.

(Signed) N. C. FRENGER,
Attorney for Defendant.

Which said Defendant's Motion and Application for Appeal is endorsed upon the back in words and figures as follows, to-wit:

No. 2586. In the District Court of the Third Judicial District of the Territory of New Mexico, in and for the County of Dona Ana. D. M. Reade, Plaintiff, vs. Pillar S. de Lea, Defendant. Defendant's Motion and Application for Appeal. N. C. Frenger, Las Cruces, N. Mex., Attorney for Defendant. Third Judicial District Court, County of Dona Ana. Filed in my office this 14 day of July,
19 1906. (Signed) Wm. E. Martin, Clerk, By John Lemon, Deputy.

And thereafter, on the 19th day of July, A. D. 1906, there was filed in the office of the Clerk an Appeal Bond, which is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

In the District Court, Third Judicial District, within and for the County of Dona Ana.

No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEE, Defendant.

Appeal Bond.

Know all men by these presents, That we, Pillar S. de Lea, as principal, and S. F. Bean and C. Armijo, as sureties, are held and firmly bound unto D. M. Reade, plaintiff in the above entitled cause for the payment of all costs that may be adjudged against the above bounded principal, and for which she may become liable, upon an appeal taken by her in the above entitled cause to the Supreme Court of the Territory of New Mexico from a judgment and decree rendered against her on the 25th day of June, A. D. 1906 in said cause, for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 14th day of July, A. D. 1906.

The condition of this obligation is such that, Whereas, the said Pillar S. de Lea, defendant in the above entitled cause, has taken an appeal to the Supreme Court of the Territory of New Mexico from the said judgment and decree in all its parts and portions, rendered in said above entitled cause on the said 25th day of June, A. D. 1906, and being in the following wording and form, to-wit:

"Now on the 25th day of June, A. D. 1906, the above entitled cause comes regularly on for a hearing upon an agreed statement of facts, now on file in this cause, the plaintiff appearing by his attorneys, Moore and Paxton, and the defendant appearing by her attorney, Numa C. Frenger, and an agreed statement of *of* the material facts in the cause having been submitted to the Court by the parties, and argument having been had thereon:

It is considered, ordered, adjudged and decreed that the estate in fee simple of the said plaintiff, D. M. Reade, in the following described tracts, of land and real estate, to-wit:

The northeast quarter (N. E. ¼) of the northeast quarter (N. E. ¼) and lots numbered one (1), five (5), six (6) and eight (8) of section twenty-four (24) in township twenty-one (21) south of range one (1) west of New Mexico Meridian, containing one hundred and sixty-three (163) acres and fifty-eight hundredths (.58) of

an acre, being the same land patented to Adolpho Lea by
21 the United States of America on June 14th, 1893; Homestead Entry Certificate No. 924; Also lot numbered one (1) of section twenty-three (23) and lots numbered two (2), Three (3), four (4) and seven (7) of section twenty-four (24) in township twenty-one (21) south of range one (1) west of New Mexico Meridian, containing one hundred and forty-four and five hundredths (144.05) acres, being the land patented to Eusebio Tapia by the United States of America on July 30th, 1891, Homestead Certificate No. 1679;

be and the same is hereby established against the adverse claim of the said defendant, Pillar S. de Lea, and that the said defendant be and she is hereby barred and forever estopped from having or claiming any right or title to the said premises adverse to the said plaintiff, and that the said plaintiff's title thereto be and the same is hereby forever quieted and set at rest, and that the said plaintiff have and recover of and from the said defendant his costs in this behalf incurred and expended, to be taxed by the Clerk, for which let execution issue.

At Las Cruces, New Mexico.

FRANK W. PARKER, *Judge.*"

and being entered of record in Book "O", at page 180, of the records of the District Court of the Third Judicial District of the Territory of New Mexico, in and for the County of Dona Ana;

Now, therefore, If the above bounded principal shall pay
22 all costs that may be adjudged against her and for which she may become liable, on said appeal, then this obligation shall be void, otherwise to remain in full force and effect.

(Signed)	PILAR S. DE LEA.	[SEAL.]
"	S. F. BEAM.	[SEAL.]
"	C. ARMIJO.	[SEAL.]

TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

On this 14th day of July, 1906, before me personally appeared Pillar S. de Lea, S. F. Bean and C. Armijo, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In Witness Whereof, I have hereunto set my hand and seal this the day and year last above in this certificate written.

[SEAL.] (Signed) N. C. FRENGER,
Notary Public in and for Dona Ana County, New Mexico.

TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

S. F. Bean and C. Armijo being each duly sworn, each upon his oath sayd that he was the owner and in possession of property in

the Territory of New Mexico of the value of Five Hundred Dollars (500.00) over and above all his just debts and liabilities, and property exempt from execution or attachment.

23 (Signed) S. F. BEAN.
" C. ARMIJO.

Subscribed and sworn to before me this 14th day of July, 1906.
[SEAL.] (Signed) N. C. FRENGER,
Notary Public in and for Dona Ana County, New Mexico.

The above bond is approved by me this 16th day of July, 1906.
(Signed) FRANK W. PARKER,
Judge of the District Court of the Third Judicial District of the Territory of New Mexico, Sitting in and for Dona Ana County.

Which said Appeal Bond is endorsed upon the back in words and figures as follows, to-wit:

No. 2566. In the District Court of the Third Judicial District of the Territory of New Mexico, in and for the County of Dona Ana. D. M. Reade, Plaintiff, vs. Pillar S. de Lea, Defendant. Appeal bond. Third Judicial District Court, County of Dona Ana.
24 Filed in my office this 19 day of July, 1906. (Signed) William E. Martin, Clerk, By John Lemon, Deputy. N. C. Frenger, Las Cruces, N. M., Attorney for Defendant.

And following on the same day there was filed in the office of the Clerk and entered of record an Order Granting Appeal which is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

In the District Court, Third Judicial District, within and for the County of Dona Ana.

No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

Order Granting Appeal.

On this 16th day of July, 1906, on motion and application of Pillar S. de Lea, the defendant in the above entitled cause, an appeal is granted to her to the Supreme Court of the Territory of New Mexico, from that certain judgment and decree rendered against her on the 25th day of June, A. D. 1906, in all of its parts and portions.

And on reading and filing the bond tendered by said defendant for costs on appeal, it is ordered that the same be, and hereby is, approved; and that a transcript of the record, proceedings and papers upon which said judgment and decree was founded, after
25 due authentication, be sent to the Supreme Court of the Territory of New Mexico.

Silver City, N. M., July 16th, 1906.

(Signed) FRANK W. PARKER,
Judge of the said District Court.

Which said Order Granting Appeal is endorsed upon the back in words and figures as follows, to-wit:

No. 2586. In the District Court, of the Third Judicial District, of the Territory of New Mexico, in and for the County of Dona Ana. D. M. Reade, Plaintiff, vs. Pillar S. de Lea, Defendant. Order granting appeal. Third Judicial District Court, County of Dona Ana. Filed in my office this 19th day of July, 1906. (Signed) Wm. E. Martin, Clerk, By John Lemon, Deputy.

And following thereon, on the same day the Clerk issued a citation on Appeal and copy thereof, which is in words and figures as follows, to-wit:

Citation on Appeal.

26 In the District Court of the Third Judicial District of the Territory of New Mexico in and for the County of Dona Ana.

Civil. No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

THE TERRITORY OF NEW MEXICO:

To D. M. Reade, Greeting:

Whereas Pillar S. de Lea has taken an appeal to the Supreme Court of the Territory of New Mexico, from the Judgment and Decree rendered against her in the above entitled cause on the 25th day of June, A. D. 1906, in which said cause you are the plaintiff, and she, said Pillar S. de Lea, is the defendant;

Now, therefore, you are hereby cited to appear in the said Supreme Court of the Territory of New Mexico, at Santa Fe, New Mexico, and answer said appeal, on the 17th day of October, A. D. 1906.

Witness the Hon. Frank W. Parker, Associate Justice of the Supreme Court of the Territory of New Mexico, and Presiding Judge of the Third Judicial District thereof, and the seal of said District Court at Las Cruces, New Mexico, this 19th day of July, A. D. 1906.

[SEAL.] (Signed) WM. E. MARTIN, *Clerk*,
By JOHN LEMON, *Deputy*.

27 On which acknowledgment of service of said Citation is in words and figures as follows, to-wit:

Service of the above citation is hereby acknowledged and admitted, and copy of the above citation is admitted to have been served and received, this the 19th day of July, A. D. 1906.

(Signed) FALL & MOORE.
" MOORE & PAXTON,
Attorneys for Plaintiff.
D. M. READE.

TERRITORY OF NEW MEXICO,
County of Dona Ana, ss:

N. C. Frenger, being first duly sworn, upon his oath, deposes and says: that on the 19th day of July, 1906, he served the above citation upon D. M. Reade, the plaintiff in the above entitled cause, by delivering a true copy thereof to his attorneys Fall & Moore and Moore and Paxton, at their office in Las Cruces, Dona Ana County, New Mexico.

(Signed) N. C. FRENGER.

Subscribed and sworn to before me this the 24th day of July, A. D. 1906.

[SEAL.] (Signed) W. A. FLEMING JONES,
Notary Public in and for Dona Ana County, New Mexico.

Which said Citation On Appeal is endorsed upon the back in words and figures as follows, to-wit:

28 No. 2586. D. M. Reade, Plaintiff, vs. Pillar S. de Lea, Defendant. Citation on Appeal. Original. Third Judicial District Court, County of Dona Ana. Filed in my office this 24th day of July, 1906. (Signed) Wm. E. Martin, Clerk. By John Lemon, Deputy. N. C. Frenger, Las Cruces, N. M., Att'y for Def't.

And thereafter, on the 25th day of July, A. D. 1906, there was filed in the office of the Clerk a Stipulation as to Transcript of Record on Appeal, which is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

In the District Court, Third Judicial District, within and for the County of Dona Ana.

No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

29 *Stipulation as to Transcript of Record on Appeal.*

Whereas, The defendant in the above entitled cause has applied for and has been granted and appeal to the Supreme Court of the

Territory of New Mexico, from that certain judgment and decree rendered against her herein, on the 25th day of June, A. D. 1906, Now, Therefore, It is hereby Agreed and Stipulated by and between counsel for the respective parties to this cause, that the following constitute the record, papers and proceedings upon which said judgment and decree was founded, to-wit, Complaint, Answer of Defendant, Reply, Agreed Statement of Facts, filed October 5th, 1905, and that they, together with said Judgment and Decree, Waiver of Notice of Appeal, Defendant's Motion and Application for Appeal Order Granting Appeal, Appeal Bond, Citation on Appeal, including admission of service and return, this stipulation as to transcript of record on Appeal, and Præcipe to Clerk of District Court for transcript of record for purpose of Appeal (to be hereafter issued and filed), only shall be embodied in the transcript of record for the purpose of appeal, that it shall be unnecessary to incorporate in said transcript any other portion of the record herein, and the incorporation of any other portions of said record is hereby expressly waived.

Las Cruces, N. Mex., July 25th, 1905.

30 (Signed) FALL & MOORE,
" MOORE & PAXTON,
Las Cruces, New Mexico, Attorneys for Plaintiff.
(Signed) N. C. FRENGER,
Las Cruces, New Mexico, Attorney for Defendant.

Which said Stipulation as to Transcript of Record on Appeal, is endorsed upon the back in words and figures as follows, to-wit:

No. 2586. In the District Court of the Third Judicial District of the Territory of New Mexico, in and for the County of Dona Ana. D. M. Reade, Plaintiff, vs. Pillar S. de Lea, Defendant. Stipulation as to Transcript of Record on Appeal. Third Judicial District Court, County of Dona Ana. Filed in my office this 25th day of July, 1906. (Signed) William E. Martin, Clerk. By John Lemon, Deputy.

And following thereon, on the same day there was filed in
31 the office of the Clerk a Præcipe to Clerk of District Court for transcript of record for purpose of Appeal, which is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Dona Ana.

In the District Court, Third Judicial District, within and for the County of Dona Ana.

No. 2586.

D. M. READE, Plaintiff,
vs.
PILLAR S. DE LEA, Defendant.

Præcipe to Clerk of District Court for Transcript of Record for Purpose of Appeal.

To the Clerk of the District Court of the Third Judicial District of the Territory of New Mexico within and for the County of Dona Ana:

The defendant herein respectfully requests that you prepare and properly certify a transcript of the following papers, orders, and proceedings filed and had in this cause, for use on appeal in the Supreme Court of the Territory of New Mexico, to-wit:

1. Complaint.
2. Answer of Defendant.
3. Reply.
4. Agreed Statement of Facts, filed October 5th, 1905.
5. Judgment and Decree rendered June 25th, 1906.
6. Waiver of Notice of Appeal.

32 7. Defendant's Motion and Application for Appeal.
8. Order Granting Appeal.
9. Appeal Bond.
10. Citation on Appeal, including admission of service and return.
11. Stipulation as to Transcript of Record on Appeal.
12. This Præcipe to Clerk of District Court for transcript of record for purpose of appeal.

Dated: July 25th, 1906.

(Signed) N. C. FRENGER,
Attorney for Defendant.

Which said Præcipe to Clerk of District Court for transcript of Record for purpose of appeal is endorsed upon the back in words and figures as follows, to-wit:

No. 2586. In the District Court of the Third Judicial District of the Territory of New Mexico, in and for the County of Dona Ana. D. M. Reade, Plaintiff, vs. Pillar S. de Lea, Defendant. Præcipe to Clerk of District Court for Transcript of Record for Purpose of Appeal. Third Judicial District Court, County of Dona Ana.

33 Filed in my office this 25th day of July, 1906. (Signed) William E. Martin, Clerk. By John Lemon, Deputy. N. C. Frenger, Las Cruces, N. M., Attorney for Defendant.

TERRITORY OF NEW MEXICO,
Third Judicial District Court, County of Dona Ana, ss:

I, William E. Martin, Clerk of the District Court of the Third Judicial District of the Territory of New Mexico, within and for the County of Dona Ana, do hereby certify that the Twenty-one hereto attached typewritten pages contain a full, true and correct transcript of the proceedings and papers filed in case No. 2586, wherein D. M. Reade is plaintiff and Pillar S. de Lea is defendant, as required by the parties to said suit to be embodied in said transcript and more fully mentioned in the Præcipe to Clerk of District Court for Transcript of Record for Purpose of Appeal, as herein stated and as the same remain on file and of record in my office.

In witness whereof, I hereunto set my hand and affix the seal of said District Court at my office in Las Cruces, New Mexico, this 4th day of August, A. D. 1906.

[SEAL.]

WILLIAM E. MARTIN, *Clerk*,
By JOHN LEMON, *Deputy*.

34 And afterwards, on *the* wit: *on* the sixteenth day of October, A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors, which said assignment of errors, was and is in words and figures, following to wit:—

In the Supreme Court of the Territory of New Mexico.

No. 1166.

D. M. READE, Appellee,
vs.
PILAR S. DE LEA, Appellant.

Appeal from District Court, Dona Ana County.

The appellant makes the following assignment of errors:

1. That the District Court erred in adjudging and decreeing that the estate in fee simple in the following described tracts of land and real estate be established in favor of the Appellee and against the adverse claim of Appellant, to-wit:—The northeast quarter (N. E. ¼) of the northeast quarter (N. E. ¼) and the lots numbered one (1), five (5), six (6), and eight (8) of section twenty-four (24) in township twenty one (21) south of range one (1) west of New Mexico Meridian, containing one hundred and sixty-three (163) acres and fifty-eight hundredths, (.58) of an acre, being the same land patented to Adolpho Lea by the United States of America, June 14th, 1893, Homestead Entry Certificate No. 924; Also lot numbered one (1) of section twenty-three (23) and lots numbered two (2), three (3), four (4) and seven (7) of section twenty-four (24) in township twenty-one (21) south of range one (1) west of New Mexico Meridian, containing one hundred and forty-four and

five hundredths (144.05) acres, being the land patented to Eusebio Tapia by the United States of America, on July 30th, 1891, Homestead Certificate No. 1679.

2. That the said District Court erred in adjudging and decreeing that the Appellant be barred and forever estopped from having or claiming any right or title to the said premises — to Appellee.

3. That the said District Court erred in its judgment and
35 decree that Appellee's title to said premises be forever quieted and set at rest.

4. That the said District Court erred in adjudging and decreeing that the Appellee have and recover of and from Appellant his costs in this cause incurred and expended, to be taxed by the Clerk.

By reason whereof, the Appellant, prays that the judgment and decree made and entered by the District Court may be reversed.

N. C. FRANGER,
Attorney for Appellant, Las Cruces, N. M.

Which said assignment of errors was and is endorsed as follows:—"No. 1166. In the Supreme Court of the Territory of New Mexico. D. M. Reade appellee, vs. Pilar S. de Lea, Appellant. Appeal from District Court, Dona Ana County. Assignment of errors. Filed in my office this Oct. 16, 1906, Jose D. Sena, Clerk. N. C. Franger Attorney for appellant, Las Cruces, New Mexico."

And afterwards, on to wit: *on* the 17th day of October, A. D. 1906 there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an appearance for appellees which said appearance for appellees was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, in the January Term, A. D. 1907.

No. 1166.

PILAR S. DE LEA, Appellant,
vs.
D. M. READE, Appellee.

Appeal from District Court, Dona Ana County.

Appellee's Appearance.

Now comes D. M. Reade, appellee in the above entitled
36 cause, by his attorneys, Moore and Paxton, and enters his appearance as appellee in said cause.

MOORE AND PAXTON,
P. O., Las Cruces, New Mexico, Attorneys for Appellee.

Which said appearance for appellees was and is endorsed on the back thereof, as follows to wit:—"No. 1166, Territory of New

Mexico In the Supreme Court, January A. D., 1907 Term. Pilar S. de Lea, Appellant, vs. D. M. Reade, Appellee. Appearance for Appellee. Filed in my office this Oct. 17, 1906, Jose D. Sena, Clerk Moore and Paxton, Las Cruces N. M., Attorneys for appellee.

And afterwards, on to wit, *on* the fourteenth day of January, A. D. 1907, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a suggestion of Death and Motion for substitution, which said suggestion of Death and motion for substitution, was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

No. 1166.

D. M. READE, Appellee,
vs.
PILAR S. DE LEA, Appellant.

Suggestion and Motion.

Now comes D. M. Reade, appellee herein, by his attorneys of record, Moore and Paxton, and suggest- to the court that on the 21st day of December, A. D., 1906, and during the pendency of this appeal, in this Court, Pilar S. de Lea, named and heretofore acting as appellant herein, departed this life at Las Cruces, New Mexico, leaving as her only surviving heirs Theresa Arnett, Katie Reade, Robert Lea, Mary Buquor and Aron H. Lea, all being sons or daughters of said Pilar S. de Lea, deceased.

Wherefore, said D. M. Reade, appellee, herein, by his said
37 attorneys, Moore and Paxton, moves the Court that said Theresa Arnett, Katie Reade, Robert Lea, Mary Buquor and *Arpn* H. Lea, be substituted as appellants herein in the place and stead of said Pilar S. de Lea, deceased; in which said motion N. C. Franger, heretofore attorney of record herein for said Pillas S. de Lea, deceased, now joins as attorney for said substituted appellants, and prays that he be entered as attorney of record for said last named appellants.

MOORS AND PAXTON,
Attorneys for Appellee.
N. C. FRANGER,
Attorney for Appellants.

Which said suggestion and motion to substitute was endorsed on the back thereof, as follows, towit:—"No. 1166 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907. D. M. Reade, Appellee, vs. Pilar S. de Lea, Appellant, Suggestion of death and Motion for substitution, Filed in my office this Jan. 15 A. D. 1907, Jose D. Sena, Clerk.

And afterwards, on towit: at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D. 1907, on the fourth day thereof, the following among other proceedings were had and entered of record, to wit:—

No. 1166.

D. M. READE, Appellee,
vs.
PILLAR S. DE LEA, Appellant.

Appeal from District Court, Dona Ana County.

This cause coming on to be heard, upon the transcript of record, assignment of errors and briefs of counsel, is argued by N. C. Franger, Esq. for appellant, and J. H. Paxton, Esq. for appellee,
38 and submitted to the Court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on to wit, *on* the seventh day of the said Regular term, the same being the 17th day of January, the following among other proceedings were had and entered of record, following to wit:

No. 1166.

D. M. READE, Appellee,
vs.
PILLAR S. DE LEA, Appellant.

Appeal from District Court, Dona Ana County.

Now comes D. M. Reade, appellee, herein, by his attorneys, of record, Jas. Hay Paxton, Esq., and suggests here to the court that on the 21st day of December, A. D., 1906, and during the pendancy of this suit herein or appeal in this court, Pillar S. de Lea, named and heretofore acting as appellant herein, departed this life at Las Cruces, N. M., le-ving as her only surviving heirs, Theresa Arnett, Kattie Reade, Robert Lea, and Mary Baquor and Aron H. Lea, all being sons and daughters of said Pilar S. de Lea. Wherefore said appellee herein, moves the court that the said Theresa Arnett, Kattie Reade, Robert Lea, Mary Baquor and Aaron H. Lea, be substituted as appellants herein in the plase and stead of said Pilar S. de Lea, deceased, and the court being sufficiently advised in the premises, grants the said motion. It is therefore considered and adjudged by the court that the said Theresa Arnett, Kattie Reade, Robert Reade, Mary Baquor and Aaron H. Lea, sons and daughters of Pillar S. de Lea, deceased, be and they hereby are substituted as parties appellants in this cause in and in the stead of the said Pillar S. de Lea, Appellant, now deceased. It is further ordered and adjudged by the court

that this order be and the same hereby is made, nunc pro tunc, as of the 14th day of January, A. D., 1907.

39 And afterwards, on to wit: at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, 1908, on the eleventh day of the said regular term the same being Wednesday, the 26th day of February A. D., 1908, the following among other proceedings were had and entered of record, following towit:

No. 1166.

D. M. READE, Appellee,
vs.
PILLAR S. DE LEA, Appellant.

Appeal from District Court, Dona Ana County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court, upon a former day of the present term, and the court being now sufficiently advised in the premises announces its decision by Associate Justice Pope, Chief Justice Mills and Associate Justices McFie and Mann, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore, considered and adjudged by the court, that the judgment of the District Court in and for the County of Dona Ana, whence this cause came into this Court, be and the same hereby is affirmed, and that in accordance therewith, it is considered, ordered, adjudged and decreed by the court, that the estate in fee simple of the said plaintiff D. M. Reade, in the following described tracts of land and real estate, towit:

The Northeast quarter (N. E. ¼) of the Northeast quarter (N. E. ¼) and lots numbered one (1), five (5), six (6) and eight (8) of section twenty-four (24) in township twenty-one (21) south range one (1) west of New Mexico Meridian, containing one hundred and sixty-three (163) acres and fifty-eight hundredths (.58) of an acre, being the same land patented to Adolpho Lea by the United States of America on June 14th, 1893, Homestead Entry Certificate No. 924; Also lots numbered one (1), three (3), four (4) and
40 seven (7) of section twenty-four (24) in township twenty-one (21) south range one (1) west of New Mexico Meridian, containing one hundred and forty-four and five hundredths (144.05) acres, being the land patented to Eusebio Tapia by the United States of America, on July 30th, 1891 Homestead Entry Certificate No. 1679; be and the same is hereby established against the adverse claim of the said defendant, Pillar S. de Lea and that the said defendant be and she is hereby and forever estopped from having or claiming any right or title to the said premises adverse to the said plaintiff, and that the said plaintiff's title thereto be and the same is hereby forever quieted and set at rest, and that the said plaintiff re-

cover of and from the said defendant his costs in this behalf incurred and expended to be taxed by the Court, for which let execution issue.

And afterwards, on the said eleventh day of the said regular term, the same being Wednesday the 26th day of February, the following among other proceedings were had and entered of record following to wit:

No. 1166.

D. M. READE, Appellee,
vs.
PILLAR S. DE LEA, Appellant.

Appeal from District Court, Dona Ana County.

It is ordered by the court upon motion of appellant that the appellant herein, do have thirty days from this date within which to file motion for re-hearing.

And afterwards, on to wit: *on* the 24th day of March, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for rehearing by appellant which said motion of Appellant for a rehearing, was and is, as follows to wit:

41 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1908.

No. 1166.

D. M. READE, Appellee,
vs.
PILAR S. DE LEA, Appellant,

Appeal from District Court, Dona Ana County.

Appellants' Motion for Rehearing.

Comes now, Theresa Arnett, Katie Reade, Robert Lea, Mary Buquor and Aaron H. Lea, appellants in the above entitled cause by N. C. Frenger, their attorney, and move the court to grant them a rehearing in this cause and to reverse and remand the Court's decision herein heretofore rendered in this cause, on February 26th A. D., 1908, upon the following grounds, to-wit:—

1. There is an error in the Court's statement of facts upon which the said decision was rendered in that at the time same was rendered Pilar S. de Lea, had died, and her only surviving heirs were and are Theresa Arnett, Katie Reade, Robert Lea, Mary Buquor, and Aaron H. Lea, who, upon motion and suggestion by appellee's attorney joined in by Appellant- counsel and filed in this court before ar-

gument were substituted as appellants in the place and stead of said Pilar S. de Lea.

2. There is error in said decision in that it is inconsistent and in conflict with the decision rendered by this court on October 2nd, A. D., 1897, in certain cause entitled Hattie E. Grary, Plaintiff in error, vs. Neill B. Field, executor et al., defendants in error, numbered 719 and reported in 9 New Mexico Reports, pages 222 et seq. The said decision rendered herein does not expressly over-rule the said decision of Crary vs. Field, et al., supra, nor does it pretend to over-rule same, but on the contrary cites same in approval and support of its decision. The said decision of Crary vs. Field, et al. being in-consistent and in conflict with the decision herein rendered, and not being expressly overruled here, is the con-
42 trolling decision upon the law presented by the case here.

3. There is error in said decision in holding that the wife coul*t* not acquire and hold an interest in community property during the existence of the marriage in that such holding is in conflict with Sections 2028 and 2030, New Mexico Compiled Laws of 1897.

4. There is error in said decision in that it is contrary to that certain code of law known as "Recopilacion de Los Indios" known also in revised form as "Novisima Recopilacion," being a set of laws promulgated by edicts and decrees of the Spanish Throne for the Government of the Spanish Colonies of the Western Hemisphere, and which was in existence in New Mexico at the time New Mexico became a part of the United States.

5. There is error in said decision in holding, as it does in substance and effect (by virtue of citing with approval decisions *based* on the same expressions), that the expressions found in the work of Febrero to-wit:—

"The husband does not need the de-solution of the matrimony to constitute himself the real and veritable owner of all the ganancial property, he having in effect the irrevocable dominion thereof, and as such can administer, barter, and they not being castrenses, or cuasi castrenses, sell and convey at his will, pr*i*viding he does not do so in defraud of his wife, come se prueba la ley."

are evidence of the law that the husband was the sole and absolute owner of the community property, and that the wife had absolutely no interest therein except as a mere expectancy, because (2) the works of Febrero are not evidence of the law, and (*b*), because the author Febrero did not intend his expressions above to be taken as contended for by the various decisions based thereon.

(*a*) The works of Febrero were *but a commentary* on the "Recop*i*acion de los Indios" or "Novisima Recopilacion," as is shown by the paragraph above quoted, he there stating at the end "como se prueba la Ley" (as the law proves) and then follows the citation by the Author "L. 5 tit. 4 Lib. 10 de Nov. Recop."

43 (*b*) To place a construction upon the above expressions of Febrero without taking into consideration other expressions in his same work and paragraphs under the same heading is in violation of the first principles of construction. That Febrero did not

intend the construction contended for by various decisions is clearly evidenced by the following expressions from his work:

In the third paragraph after the paragraph above quoted appears the following:

"The wife is not bound for the bond that her husband may make. As if he trusted some one, paid for him and did not recover what was paid for the reason of his being poor, it shall be charged to his private (separate) property, because trusting is alienating and losing, and the husband is not compelled to trust; and if he does do it is recognized a fraud on the woman, and no one of the associates can alienate more than his share according to right, for that reason he should indulge (risk) his own property and not that of the common of the increased. Although it is compulsory that the debts that are contracted by one of the associates, as the society subsists, they should be paid for that capital."

Several paragraphs before the quoted paragraph upon which decisions are based appear the following:—

"Be it said gananciales are the property which the husband and the wife or any one of the two acquired jointly during the matrimony by purchase or other contract, or by means of their joint work or industry, as also the products of property that each took to the matrimony, and if living this acquires by any title (citing L. 1 and 4 tit 4 Lib. 10 Nov. Recop.) Such property are their own between both married parties, whether they come from donation from the king or that any other may make to them in common or whether by purchase of contract, even if it is executed in the name of one solely. *The reason is that our laws consider husband and wife one and the same person.* In the same *was* are in common the debts unless they have been contracted before their marriage, in which cases the one who contracted should pay them."

44 "This community of property and of debts *was not recognized by the ancient right*, as all the property *was presumed to belong to the husband*, assigning to the wife those which she justified as hers; unless she had art or profession by which she could acquire honestly in which case she *has* heard in judgment, and she was adjudged those which seemed justifiable. In Cordoba by ancient custom founded upon this legislation the wife did *not* acquire gains, except by express covenant; *but* actually in virtue of *Law* 13 *title* 4 *Book* 10 *Nov. Recop.* which abolished it, the same right is observed as in Castile. In the Village of Albequerque, Jeres de los Caballeros and other towns of its border, in which is in force the statute called the Bailio, are communicated by half between the married couple the property that is found at the death of any one of them, considering them all gananciales, even when one should not take a single thing to the matrimony. This is understood if no covenant should interfere to the contrary."

"Gananciales are called the property acquired during the matrimony nor only when the husband and wife cohabitate in the same town and house, but even if they are in several, provided that he should subsist, for instance if the husband is employed and the wife because the climate is obnoxious to her health or for other just motive

remains in her country, or if she has one employment and the husband another in another place; in these and other similar cases subsist the matrimony to the society and union of their wills, although not that of theid bodies, in this wal all that each may make or both of them *should communicate themselves and devide by half* (citing tit. 9 Book 5 Nov. Recop.) notwithstanding that some believe that for his simultaneous cohabitation is necessary."

"The same happens, be it earned by one alone or both during the matrimony; as although one does not work, that does not prevent him from participating in the profits, because for this sole object through the legal consession *they are associates of universal partnership* in which the society and participation or the profits is not forbidden, for trading and working the one and the other doing nothing, for the reason that it is business with the means and name of both, althoug- only one is heard."

"The property which as gananciales *should be divided with equality between husband and wife* are not only with the money or wealth in common, but also those purchased by the husband himself or his wife, with his tacit consent or expressed license although it be the common mone- of both in common or of either of them, as it goes to them in any way in the form explained, because it is understoos at the time of its acquisition, and not to the person in whose name may be carried the sale and purchase."

6. There is error in said decision in holding that the husband was the sole and absolute owner of the community property; that the interest of the wife was a mere expectance; that as to community property the husband and wife, did not constitute a society, association, partnership or company; that the wife during marriage does not possess and own and subsist interest in community property; that the husband's power to alienate property without the wife joining in the conveyance was that of an administrator or trustee of the conjugal society, association, partnership or company,—for the reason that such holdings are contrary to the great weight of authority.

Wherefore, Appellants pray that a rehearing be granted and this cause be reversed and remanded.

N. C. FRANGER,
Attorney for Appellants, Las Cruces, N. M.

March 23rd, 1908.

And afterwards, on to wit, *on* the fourteenth day of the said regular term, the same being Wednesday, the second day of September, A. D., 1908, the following proceedings, among other things were had and entered of record, towit:

46 No. 1166.

D. M. READE, Appellee,
vs.
PILLAR S. DE LEA, Appellant.

Appeal from District Court, Dona Ana County.

This cause coming on for hearing upon the motion of appellant herein for a rehearing, and the court having had said motion under advisement, and being fully advised in the premises, denies said motion. It is therefore considered and adjudged by the court that the motion of appellant for a rehearing herein be and the same hereby is overruled and denied.

It is further ordered by the court that the suggestion of the death of the appellant herein, Pilar S. de Lea, deceased, That Theresa Arnett, Katie Reade, Robert Lea, Mary Buquor and Aaron H. Lea, sons and daughters of appellant deceased, be and they hereby are substituted as parties appellants in the plase and stead of said Pilar S. de Le- deceased as parties to said suit. It is therefore considered and adjudged by the court that the estate in fee simple of the said appellee D. M. Reade, in the following described tracts of land and real estate, to-wit: The Northeast quarter (N. E. ¼) of the Northeast quarter (N. E. ¼) and lots numbered one (1), five (5), six (6) and eight (8) of section twenty-four (24) in township twenty-one (21) south of range one (1) west of New Mexico Meridian, containing one hundred and sixty three (163) acres and fifty eight hundredths (.58) of an acre being the same lands patented to Adolpho Lea by the United States of America, on June 14th, 1893, Homestead entry Certificate No. 924; Also lots one (1) of section twenty-three (23) and lots numbered two (2), three (3), four (4) and seven (7) of section twenty-four (24) in township twenty-one (21) south of range one (1) west of New Mexico Meridian, containing one hundred and forty-four and five hundredths (144.05) acres, being the land patented to Eusebio Tapia by the United States of America, on July 30th, 1891, Homestead Certificate No. 1679. Be
47 and the same is hereby established against the adverse claim of the appellants, Theresa Arnett, Katie Reade, Robert Lea, Mary Buquor and Aaron H. Lea, and that the said appellants be and they are hereby barred and forever estopped from having or claiming any right or title to the said premises adverse to the said appellee, and that the said appellee's title thereto be and the same is hereby forever quieted and set at rest, and that said plaintiff have and recover of and from the said appellants his costs in this behalf expended, to be taxed for which let execution issue.

And afterwards, on to wit, *on* the 3rd day of September, A. D. 1908, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, and affidavit of value which said affidavit of Value, was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico.

No. 1166.

D. M. READE, Appellee,
vs.
THERESA ARNETT et al., Appellants.

Appeal from District Court, Dona Ana County.

Affidavit of Value of Matter in Dispute.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

N. C. Franger, of lawful age, being first duly sworn, upon his oath, deposes and says: that he is the attorney for the appellants in the above entitled cause, to-wit Theresa Arnett, Katie Reade, Robert Lea Mary Buquor and Aaron H. Lea, who upon motion and suggestion of counsel were substituted as such Appellants in the place of and stead of Pilar S. de Lea, she having died after the appeal was taken to said Supreme Court of the Territory of New Mexico, from the District Court sitting in and for the County of Dona Ana, and while said cause was pending on said appeal; that he is well
48 acquainted with the real estate and property involved in this cause, the same being claimed in whole by Appellee in this cause on the one hand, and by the said Appellants on the other; that he is well acquainted with the value of the said premises and real estate and that the reasonable market value thereof and the matter in dispute in this cause exceeds the sum of Five Thousand ($5,000.00) dollars, exclusive of all costs in this cause: That this affidavit is made for the purpose of appealing said Cause to the Supreme Court of the United States from the Judgment and decree rendered in said Supreme Court of the Territory of New Mexico, on Feb. 26, 1908,—and upon the further Judgment and decree thereof overruling Appellants' motion for rehearing but correcting the record as to parties Appellant, rendered September 2nd, 1908.

N. C. FRANGER.

Subscribed and sworn to before me this 3rd day of September, A. D. 1908.

[SEAL.] ANITA J. CHAPMAN,
Notary Public in and for the County of Santa Fe, Territory of N. M.

My Commission expires Aug. 17, 1911.

And afterwards, on to wit *on* the fifteenth day of the said regular term, the same being Thursday the 3d day of September, A. D. 1908, the following among other proceedings were had and entered of record, to wit:

No. 1166.

D. M. READE, Appellee,
vs.
THERESA ARNETT et al., Appellants.

Appeal from District Court, Dona Ana County.

Now comes the appellants by their attorney N. C. Franger, Esq., and move the court to be granted an appeal to the Supreme Court of the United States, from the judgment and decree of this Court, and the court being sufficiently advised in the premises, grants the said motion. It is therefore considered and adjudged by the
49 court that the appellants herein, do have an appeal from the judgment and decree of this Court to the Supreme Court of the United States.

And heretofore, on to wit, *on* the twenty-first day of February, A. D. 1908, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court, was and is in words and figures, following to wit:

50 In the Supreme Court of the Territory of New Mexico,
January Term, A. D. 1908.

No. 1166.

D. M. READE, Appellee,
vs.
PILAR S. DE LEA, Appellant.

Appeal from District Court, Dona Ana County.

Syllabus.

1. It is the settled doctrine of this Court that property rights of husband and wife are, except as modified by local statute, to be judged by the Spanish law in force in this Territory at the date of its acquisition from Mexico.

2. Under the community system, which was a part of that system of law, the wife, had, until the termination of the marriage relation, no vested or tangible interest in the community property and her interest therein was a mere expectance similar to that which an heir possesses in the estate of an ancestor.

3. Under that system the husband *in* the other hand was, so long as the marriage relation existed, for all practical purposes, the real and veritable owner of the community property.

4. Under that system the husband, subject always to the limitation that he should not act in fraud of his wife's expectancy, had, dur-

ing the marriage relation, full power to sell community property and it was not necessary that his wife join in the conveyance.

5. The right of alienation by his personal deed thus given the husband attaches as a vested right in community property as such is acquired and such right is not subject to legislative interference.

6. The Act of March 20, 1901 (L. 1901, c. 62 Sec. 6) providing that neither husband nor wife shall dispose of real estate acquired during coverture by onerous title, unless both join in the execution of the deed, does not affect such property, acquired prior to the passage of the act.

51 7. A deed executed subsequent to that act for property deeded to the husband for valuable consideration previous to the act and during the marriage relation, conveys the title, although such deed was signed only by the husband.

Statement of the Facts.

One Adolpho Lea and the defendant Pilar S. de Lea, were married in December 1851, and continued to be husband and wife until the former's death intestate in Dona Ana County in April 23, 1902. The premises involved were acquired by two conveyances running to the Husband Adolpho, dated respectively April 6, 1889 and June 14, 1893. In April 1902 and thus only a few weeks before his death the husband for a valuable consideration executed to D. M. Reade a warranty deed for the land in dispute. The wife did not join in the deed Reade brought suit to quiet the title against the wife and the trial Court, holding that she had no interest in the land, rendered judgment for Reade, from which decision she prosecutes this appeal.

Opinion of the Court.

POPE, *J.*:

(After making the foregoing statement of the facts.)

The case turns upon the effect of the deed from Adolpho Lea to Reade. The appellant contends that it conveyed no title because the wife did not join as required by Section 6 of Chapter 62 of the laws of 1901, which provides that "neither husband nor wife shall convey, mortgage, incumber or dispose of any real interest or legal or equitable interest therein acquired during coverture by onerous title unless both join in the execution thereof." The appellee concedes that the property was acquired during coverture by onerous title. He admits that if that act is applicable the judgment was wrong. He contends, however, that the act cannot apply to property acquired privious to its date, for the reason that, as to such, vested rights existed in the husband which it was beyond the power of the legislature to take away by requiring the wife to join.

52 Was the trial Court right in sustaining this view? This involves an inquiry as to what were the rights of the husband in the property prior to the act of 1901.

This Court has in a number of cases dealt with questions of property rights between husband and wife and has uniformly recognized

the civil law, in the absence of specific statute, as controlling. A brief review of former decisions of this Court upon this point will demonstrate this.

In Chaves v. McKnight, 1 N. M., 148, decided in 1857, opinion by Judge Brocchus it was held that the civil law was the rule of practice in this Territory and that by its terms the wife acquires a tacit lien or mortgage upon the property of the husband to the amount of the dotal property of which he became possessed through her. This case has been referred to in one or two very recent decisions of this Court. (Ilfield v. Baca, 89 Pac. 244; In Re Myer 89 Pac. 246.) In Martinez v. Lucere 1 N. M., 208, decided the same year by the same Judge, it was held, applying the civil law, that during marriage the administration of the dotal property belongs exclusively to the husband and the wife cannot during the conjugal association recover it from her husband without showing waste or dissipation of it by her husband. In Laird v. Upton, 8 N. M. 409, 415 (decision in 1897 by Mr. Justice Collier) reference is made to the community system and the presumption inhering in that system that all acquisitions during marriage are community property. In Barnett v. Barnett, 9 N. M. 207, opinion by Chief Justice Smith, it was held that in the absence of any statute ascertaining the rights of husband and wife, after legal separation and during the lives of each, the civil law of Spain governs and that under this law the wife by adultery forfeits the right which that law gives on dissolution of the community to one half of the community property. In Crary v. Field, 9 N. M. 229, S. C. 10 N. M. 257, the right of the surviving husband under the civil law to sell so much of the
53 community realty as may be necessary to pay the community debts is declared and the validity of such a sale is upheld. In Neher v. Armijo, 9 N. M. 235, opinion by Mr. Justice Crumpacker, it is held, announcing the familiar civil law doctrine, that the legal presumption that property acquired by either husband or wife during the matrimony is community property, may be overcome by clear and conclusive proof to the contrary. In Gillett v. Warren, 10 N. M., 523, 542 (opinion by Mr. Justice Parker) the community system is recognized as in force and it was there held that the surviving husband not only had the power under the system, to sell community real estate, in payment of community debts, (as ruled in Crary v. Field *supra*) but community personalty as well. In Strong v. Eakin, 11 N. M., 107, (opinion by Mr. Justice McFie) the Spanish Law as to community or acquest property is again held to be in force in so far as not abrogated by statute, and, interpreting that law, it is held that all property acquired and held by husband and wife during coverture, is presumed to be community property and to be subject to community debts and that every debt contracted during marriage is likewise presumed to be a community debt. In Brown v. Lockhart 12 N. M. 10 (Opinion by Chief Justice Mills) the doctrines announced in Strong v. Eakin, *supra* are reiterated. In McAllister v. Hutchison, 12 N. M., 111, 117, (Opinion by Mr. Justice Baker) the civil law community system is recognized as governing the alienation of marital property.

From the foregoing we consider it declared by the harmonious decisions of this court, both before and since the introduction of the common law by the act of January 7, 1876, (C. L. Sec. 2871) that the civil law controls the present case unless modified by the act of 1901. Indeed, this is not controverted by counsel in their briefs. It only remains therefore, to determine, *first,* what was the nature of the community system as to matters of property; *Second,* what were the husband's rights as to such property (the marriage
54 still existing), at the date of the act of March 20, 1901; and *third* what effect if any that act had upon such rights.

The general principles applicable to the community system are declared with great unanimity by the authorities. Upon marriage, the law recognized a partnership between the husband and wife, as to property acquired during such relation by title not gratuitious, Schmidt Law of Spain, and Mexico, pp. 12-14. The relationship has been variously described as a community of property (Ballinger on Community Property, Section 18), a conjugal partnership (Childers v. Jones 6 La. Ann. 634; Mabie v. Whittaker 10 Wash. 662.), a matrimonial co-partnership (Ord v. De La Guerra 18 Cal. 7), a property partnership (Fuller v. Fergusson 26 Cal. 569). Of course the word partnership as thus used is a matter of mere analogy, since the marital relation, viewed in its business aspect, differs very evidently from the commercial partnership. Ballinger Sec. 16. Under the community system the husband has the fullest power of management and disposition of the community property subject only to the condition that he shall not act in fraud of his wife. He had the right to sell community property, real or personal, during her life time without her consent. Suc. of Cason 32 La. Ann. 792; Brewer v. Wall, 23 Tex. 585 76 A. D. 76; McAllister v. Hutchison, 12 N. M. 117; Garross v. Dastas 204 U. S., 64. He might give it away, Smith v. Smith 12 Cal. 216, 73 A. D. 535; Lord v. Hough 43 Cal. 581; Spreckles v. Spreckles 116 Cal., 339; Trahan v. Trahan, 8 La. Ann. 455; at least to relatives in moderate amount, Schmidt, Art. 54; I Febrero Mejicano, C. 10, Sec. 20 p. 226. In all suits affecting the community property the wife is not a party but such suits must be brought by the husband. Mott v. Smith, 16 Cal., 534; Spreckles v. Spreckles 116 Cal. 339; Moseley v. Henry, 66 Cal., 478, Murphy v. Coffee, 33 Tex., 508, or against him, Althof, v. Conheim 38 Cal. 230, 99 A. D., 363. If the community property be stolen, the indictment alleges that he is the owner. State v. Gaffery 12 La. Ann., 265; and his wife's consent to the taking of the
55 property affords the thief no defense. People v. Swalm 80, Cal., 46, 13 A. S. R. 96.

While all these characteristics of the community are generally admitted by the law writers a very marked difference of authority is encountered when we come to define the relative estates of the spouses in the community, the precise question here. The "perplexity of this question is noted by Mr. Ballinger in Section 32 of his very useful work. The divergence of opinion is present here for it is contended by the appellants that the wife is the half owner of the community estate, that the plenary powers given the husband are

purely as an agent or trustee and not of his own right, and that as a corollary from this the legislature may change or limit these provisions without interfering with vested rights, the argument being that there can be no vested right to administer a trust. On the other hand it is urged by appellees that the complete dominion of the husband over the community estate is a property interest held as a present personal right and this vested beyond possibility of legislative interference.

The cases contained- expressions upon the relative estates of husband and wife under the community law are quite numerous, but an examination of these will develope that such expressions are usually made *arguendo* and often without distinguishing between such rights during the marriage relation and after its dissolution. The later decisions also are more or less influenced in their views by statute and by modern tendency toward greater property rights for the weaker sex. In dealing with the matter we have found the greatest help in the early authorities from the civil law states, where the Courts have dealt with the subject in the very light of the ancient law, aided by a bar trained under that system and where they have thus uninfluenced by modern thought, declared what the Spanish law was, not what in the light of advancing civilization it should have been.

Consulting these authorities, it is found that those from the State of Texas, countenance at least the first of the propositions
56 urged on behalf of the appellants and in Washington are found decisions sustaining all three. Thus it was said in the early Texas cases of Wright v. Hayes, 10 Tex. 136, 60 A. D. 200: "The rights of property of husband and wife in the effects of the community are perfectly equivalent to each other. The difference is this, that during coverture her rights are passive; his are active." Proceeding to hold that upon abandonment of the wife by the Husband, the wife has the power to manage and sell community property, the court observed:

"Her right in that property is equal to that of the husband. During his presence he has the administration, subject to the trusts encumbered upon the property. This right of control must necessarily cease when he can and will no longer exercise it; and the wife, the other joint owner; must be vested with the authority or it cannot exist anywhere."

This right of the wife to administer the community property upon abandonment by her husband has been repeatedly recognized by the Texas Courts. Check v. Billows, 17 Tex. 613; Veramendi v. Hutchins 48 Tex. 550; Zimpleman v. Robb, 53 Tex. 274; and has been recognized in the case of the husband *be* confined in the penitentiary, Slater v. Neal 64 Tex. 222, and in one case it was held that this applied even in the case of his insanity, Forbes v. Moore, 32 Tex. 196. So far however as Wright v. Hays, and the subsequent Texas cases above cited tend to declare that the wife's and husband's titles are *legally* equal under the community system they are discountenanced by the later cases of Edwards v. Brown 68 Tex. 329, and Patty v. Middleton 82 Tex. 586, which declare that the spouses

have "an equal *beneficial* interest." This modification of the original Texas doctrine is pointed out in Sadler v. Neisz 5 Wash. 182, a case from the other jurisdiction supporting the enlarged view of the wife's rights under the community system. The extent of the wife's rights in the Texas community *are* also discussed by Judge Maxey in Kircher v. Murray 54 Fed. 626, where, upon a full
57 review of the Texas cases, she is declared to have only "an *equitable* interest and title."

In Washington the early case of Holyoke v. Jackson, 3 Wash. Ter. 235, went to the full length of the propositions above named. This being the authority principally relied upon by appellant we shall consider it with some detail. In that case it appears that the legislature of 1879 passed an act similar to our act of 1901, requiring the wife to join with the husband in disposing of community property. The husband without joining his wife and subsequent to that law contracted to convey community property. The validity of that act was the question. It was there said:

"It (the community) is like a partnership, in that some property coming from or through one or other or both of the individuals forms for both a common stock, which bears the losses and receives the profits of its management, and which is liable for individual debts; but it is unlike, in that there is no regard paid to proportionate contribution, service, or business fidelity; that each individual, once in it, is incapable of disposing of his or her interest; and that both are powerless to escape from the relationship, to vary its terms, or to distribute its assets or its profits. In fixity of constitution a community resembles a corporation. It is similar to a corporation in this, also, that the state originates it, and that its powers and liabilities are ordained by statute. In it, the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent but identified. It is *sui generis*,—a creature of the statute. By virtue of the statute, this husband and wife creature acquires property. That property must be procurable, manageable, convertible, and transferable in some way. In somebody must be vested a power in behalf of the community to deal and dispose of it. To somebody it must go in case of death or divorce. Its exemptions and liabilities as to indebtedness must be defined. All this is regulated by statute. Man-
57½ agement and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband, and lay it upon the husband and wife together. As the husband's 'like absolute power of disposition as of his own separate estate,' bestowed by the ninth section of the act of 1873, was a mere trust conferred upon him as a member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and his wife

jointly. This was done. When, therefore, in 1880, the plaintiff in error, without his wife, entered into an agreement to sell the land in question, he agreed to do what he himself, by himself, could not do, and therefore could not agree to do. To make an actual sale or conveyance without his wife, he had no power. The law says such a thing should not be done."

There are similar expressions in Mabie v. Whitaker 10 Wash. 656. It is unnecessary to consider how far the Washington decisions are influenced by the fact that the community system in that State is, as pointed out in Brotton v. Langert, 1 Wash. 79, purely a creature of local statute; not how far Holyoke v. Jackson is discredited by certain expressions in the later case of Sadler v. Neisz 5 Wash. 182, from the same Court or by the fact that Hill v. Young, 34 Pac. 144, another Washington case, seems to consider as an open question the very point ruled by Holyoke v. Jackson. We forbear the discussion of these questions, for the reason that we believe the case of Holyoke v. Jackson, even conceding to it all that may be claimed upon these matters of detraction, is against the great weight of authority explanatory of the Spanish community system and its assumptions as to the rights of the spouses, are contrary to the spirit of the
58 civil law. These authorities we will proceed to consider in detail.

Among the earliest decisions are those from Louisiana. That Court is entitled to peculiar respect because of the high learning of its early judges in civil law matters. Perhaps the first accessible case dealing with these questions is Dixon v. Dixon's executors 4 La. 188, 23 A. D., 478, decided in 1832. In that case there are expressions to the effect that the wife has a present right to a share of the acquest property arising not as a result of dissolution of the marriage but as originating out of the very marriage contract. It is recognized in that case however that the doctrine thus announced is contrary to authority, for we find the following language:

"We are aware the principles here recognized do not correspond with the do-treine taught by the highest authorities in the French law, by Dumonlin, Pothier and Toullier. They hold that the wife has no right whatsoever until the marriage is dissolved or the community otherwise terminates. That she has nothing but a mere hope or expectancy."

The court seeks, however, to distinguish the French Law from the law of Louisiana upon the ground that the latter (borrowed from the Spanish law) permits the wife, upon the death of her husband, to bring an action to set aside an alienation made in fraud of her, by him, during coverture. It is argued as follows:

"The exercise of such a right does appear to us utterly opposed to the principle that the wife has no interest in the property, until the community is dissolved; for if she has not, how can he maintain an action to set aside the alienation?"

The effect of this case as authority and an answer to the argument it makes is found in the later and leading case of Guice v. Lawrence, 2 La. Ann. 226, decided in 1847. In that case it is distinctly held that the laws of Louisiana, like those of Spain, recognize no title in

the wife during marriage to any part of the acque-ts and that she becomes the owner of the one half only after the dissolution
58½ of the marriage. In speaking to this point the court says:

"The laws of Louisiana have never recognized a title in the wife during marriage, to one-half of the a-que-ts and gains. The rule of the Spanish law on that subject, is laid down by Frebrero, with his usual precision. The ownership of the wife, says that autho*t*, is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has *gananciales*, nor is she to prevent her husband from using them, under pretext that the law gives her one-half. But, *soluto matrimonio*, she becomes irrevocably the owner of one undivided half, in the manner provided by law for ordinary joint ownership. The husband is, during the marreage, *real y verdadera dueño de todos, y tiene en el efecto de su dominio irrevocable.* Febrero Adic. tomo 1 y 4, Part 2d, bk. 1st, Chap. 4, Parag. 1, nos. 29 and 30. Pothier Communitaté, p. 35 and following. L2 Toullier, Chap. 2, nos. 22 to 31, 14 Duranton, Droit Franc. p. 281, and foll. 10 Dalloz, Jurisp. p. 198 and fol. The provisions of our Code on the same subject are the embodiment of those of the Spanish law, without any change. The husband is head and master of the community, and has power to alienate the immovables which compose it by an encumbered title, without consent or permission of his wife. Civil Code, art. 2373."

Referring to the argument above quoted from Dixon v. Dixon supra, it is said:

"With the reasoning of the Court in 4th La. we cannot agree, although the conclusions to which they come may have been correct on other grounds. The difference supposed by the Court to exist between our Code and that of France, is imaginary. Under both, cases of fraud are excepted from the general power given to the husband to alienate the acque-ts and gains. See 7th Sierey, 1st Sect. p. 401. The provisio of Art. 2373 cannot be construed as giving or recognising a title to or in the wife as well might it be said that children have a title in the property of their father, because he is prohibeted from disposing of it in fraud of their legitime."
59 We may interpolate here the observation that the right of the wife, during the husband's life time, to proceed in equity to set aside a conveyance in fraud even of dower, is well established. Smith v. Smith 12 Cal. 216, 73 A. D. 533, citing Swaine v. Perine 5 Jones Ch. 482; Stroup v. Stroup, (Ind.) 27 L. R. A. 527; Petty vs. Petty 4 B. Mon. (Ky.) 215; and yet dower under the common law system is a mere expectance, constituting during the husband's lifetime no vested right, and being subject to legislative repeal or limitation at any time before it vested by the husband's death. Randall v. Kreiger 23 Wall., 148; Cooley's Cons. Limit. (7th Edit.) p. 513-514; McNear v. McNeer (Ill.) 19 L. R. A. 256 and note; monographic note to Rosw v. Rose, 84 A. S. R. 430, 446.

Recurring from this observation upon a common law parallelism, to the Louisiana Authorities, we find language similar to Guice v.

Lawrence in Succession of Boyer, 36 La. Ann. 506, 511 where it is said:

"Under our law the husband is head and master of the community During its existence he may dispose of its effects as he pleases, subject only to the right of the surviving wife, upon its dissolution to proceed against his heirs for the one half of the same, provided she can prove that the transfer or other disposition was made with the fraudulent intent to injure her. In fact the wife has during the marriage no vested proprietary interest in any property composing the community but only an inchoate right which entitles her to the hope or expectation that if she survives her husband she can receive or own half of the property that may be left after payment of the community debts."

In Suc. of Cason, 32 La. Ann. 792, it was said:

"During the existence of the community the husband is practically the owner of the community property."

In the more recent Louisiana cases the doctrine of Guice v. Lawrence is consistently followed and that case also has the sanction of as high authority as the federal supreme Court. In the 59½ recent case of Garrozi v. Dastas, 204 U. S. 64, the appeal was from the United States District Court from Porto Rico. The trial Court held that upon dissolution by divorce of the marriage and the adjustment of the community rights, there involved, the husband was chargeable with unreasonable or extravagant expenditures. In holding this to be error and in upholding the very broad powers of the husband during marriage, it is said by the Court speaking through Mr. Justice White, himself a Louisiana Lawyer and jurist:

"The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that in the absence of express limitation he can, after dissolution of the community be called to account and compelled to return the community money which he has actually expended during the existence of the community, because, in the judgment of the court, such expenses may be deemed to have been not suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system as prevailing, not only under the Spanish and Porto Rican codes, but as obtaining in those co-ntries of the contenent of Europe and here where that system prevails. We need not consider whether the community was derived from the Roman Law, from an express provision of the e rly Saxon law, or from the ancient customary law of the continent. For, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restrictions, to deal with the community and its assets as the owner thereof, the purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy and

common sacrifice, was yet, as a matter of necessity, during the existence of a community, not to render the community inept and valu-less to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent."

60 It is pointed out in the decision that under the law of France prior to the Napoleon Code, "the extent of the power of the husband as to the community property was so great that it was considered in theory that the rights of the wife in or to the community were not merely dormant during marriage but had no existence whatever" and "that the wife during the existence of the community had but a mere hope or expectancy and hence no interest whatever in the property or goods of the community until the community was dissolved" and that from this arose the legal epigram "that the community was a partnership, which only commenced on its termination."

Referring to the power of the husband over the community, the Court quotes as follows from the French author Troplong:

"This power of the husband, which effaces the personality of the wife, and which is manifested by the name of lord and master of the community, given to the husband; this power, which seems like unto an absolute sovereignty, exists as well in the relations of the spouses between themselves as in their dealings between third parties. In effect, the husband can dissipate the goods of the community; he can lose, destroy, break and dilapidate. *Martius potest perdere, dissipare, abuti;* this is an elementary axion of the Palace (of Justice). The wife has no right to call the husband to account, no damage to obtain for his acts. Hence it is true, indeed, that the husband is more than an administrator; he is an administrator *com libera.*"

It is further pointed out by the Court that while these principles of the French law were somewhat modified by the Code Napoleon the power of the husband under the Spanish system was in principle more extensive than it was under the code Napoleon, and in elucidation of his authority under that system, the quotation which we have made above from Guice v. Lawrence is inserted in full, wherein, following Febrero Mejicano, it is said that the wife must not say during coverture that she has *gananciales* under the pretext that the law gives her one half.

61 Next in age to the Louisiana decisions are those of Missouri. While the Spanish law of community was displaced in that state as early as 1807, there are several cases which discuss it. Thus, in Riddick v. Walsh, 15 Mo., 355, decided in 1852, it was said:

"By the Spanish law of community, the husband and wife became partners in all the estate, real and personal, which they respectively possessed. All that was acquired or purchased during coverture, whether real or personal estate, went into partnership, as being presumed to have been the fruits of the joint industry and economy of the husband and wife. On the dissolution of the partnership, by death, the surviving party and the representatives of the deceased,

each took back what was brought on his or her side into the partnership, in value or kind; in value, of personal estate, in kind, of real estate; and what remained, being considered as gain or profits, was equally divided as between partners. The husband, being the most suitable person, managed the concerns of the partnership, and might, without the consent of the wife, dispose of any of the partnership effects, purchased during the marriage."

In Moreau v. Detchemendy 18 Mo. 522, the question there involved was not dissimilar from that at bar. There, the inquiry was as to whether the introduction of the common law took away from the husband the right which existed in him previously under the community system of disposing of community property without the consent of the wife. In deciding this question in the negative the Court uses the following language:

"The right which the wife had in the property of the community acquired during the marriage, was not the estate of a joint owner, entitled to claim its administration or to call the other owner to account. It is said by Febrero that the ownership of the wife is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife cannot say that she has acquisitions, not is she to prevent her husband from using
62 them, under the pretext that the law gives her one-half. But the marriage being dissolved, she becomes irrevocably the owner of one undivided half, in the manner provided by law for the joint ownership. The husband is, during the marriage, the actual and true owner of all. (Febrero, book 1 Ch. 4, paragraphs 1, Nos. 29 and 30)."

In Nevada, in dealing with a statute identical with the California Statute (which as we shall presently see was simply declaratory of the Spanish community law), it was said in Crow v. Van Siekle 6 Nev. 149;

"The power of management and absolute disposition of the common property this conferred by the statute, clothes the husband with such ownership and authority as to warrant the allegation in a complaint of this kind, that he is the owner of the chose in action. Certainly the wife has no interest which will justify any interference on her part, not has the defendant in such case any ground of complaint, for the plaintiff is the owner of the moiety and so far as the right of prosecuting the action is concernce, he is in effect the absolute owner of the entirety."

In California, as early as 1850 an act was passed "giving the husband the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate property." This act has been treated by the courts of California as practically declaratory of the civil law. Panaud v. Jones, 1 Cal. 488, Meyer v. Kinzie, 12 Cal., 248; so that the observations of that Court on the Spanish Community system are peculiarly pertinent. The property right of husband and wife during the existence of the marriage were considered by the courts of that state as early as 1851, when the Supreme Court in Panaud v. Jones, 1 Cal., 488, 515 quotes, as defining the property rights of the

spouses, the following from Febrero Mejicano, 225, Sec. 12 and 20:

"The wife is clothed with revocable and *feigned* dominion and possession of one half of the property acquired by her and
63 her husband during the marriage; but, after his death, it is transferred to her effectively and irrevocably, so that, by his decease, she is constituted the absolute owner in property and possession of the half which he left. The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the *Gananciales*, since, even during the marriage, he has in effect the irrevocable dominion, and he may administer, exchange, and, although they be neither *castrenses* nor *quasi castrenses*, acquired by him, may sell and alienate them at his pleasure, provided there exists no intention to defraud the wife. For this reason, the husband living, and the marriage continuing, the wife cannot say that she has any *Gananciales*, not interfere with the husband's free disposition thereof, under pretext that the law concedes the half to her, for this concession is intended for the cases expressed and none other."

In Van Maren v. Johnson, 15 Cal. 308, it was said, the opinion being by Mr. Justice Field:

"The common property is not beyond the reach of the husband's creditors existing at the date of the marriage and the reason is obvious; the title to that property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy like the interest which an heir may possess in the property of his ancestor," citing Guice v. Lawrence 2 La. Ann. 226, *supra*. Likewise in Packard v. Arrellanes 17 Cal., 539 it was said, the opinion being by Judge Cope and concurred in by Justice Field:

"During the marriage the husband is the head of the community and the law invests him with discretionary power in all matters pertaining to its business or property. In fact, its business is conducted and its property acquired in his name and his authority in the administration of its affairs is exclusive and absolute. The wife has no voice in the management of these affairs nor has she any vested or tangible interest in the community property. The title to
64 such property rests in the husband and for all practical purposes he is regarded by the law as the sole owner. It is true, the wife is a member of the community and entitled to an equal share of the acquests and gains; but so long as the community exists her interest is a mere expectancy and possesses none of the attributes of an estate either at law or in equity."

This language was adopted *verbatim* as a part of the opinion of this Court in Barnett v. Barnett 9 N. M. 214 and must be regarded therefore as peculiarly persuasive. In Greiner v. Greiner 58 Cal. 115, 118, it is reiterated that "the interest of the wife during the coverture was a mere expectancy, like the interest which an heir may possess in the property of his ancestor."

It is true that there are expressions in Beard v. Knoe 5 Cal. 252. 63 A. D. 125, De Godey, v. Godey, 39 Cal. 157 and perhaps other California cases tending to support the view that during the exist-

ence of the community the wife has a present vested interest rather than a mere expectancy. That this is not the view of the California Court, however, is shown not only by the cases above cited, but also by the recent and well considered cases of Spreckles v. Spreckles 116 Cal. 339, 58 A. S. R., 170-177, 36 L. R. A., 499-502, where these latter cases are noted, reviewed and discredited and the California doctrine of Van Maren v. Johnson *supra* emphatically reiterated.

It being thus established by expressions from leading community law states approved by this Court and the Supreme Court of the United States, that the wife had under the Spanish law "a mere expectancy," in the community property and that the husband pending the dissolution of the marriage relation was "the real and veritable owner of said property" with power of alienation by his personal deed, can an act of the legislature requiring that a deed be signed by both his wife and himself be held constitutionally to apply to property previously acquired? We think it cannot. The wife's interest being merely an expectancy it constituted no vested
65 right. The wife having no vested interest and it being evident that the proprietary right must be vested somewhere, it follows under the rule of exclusion that such right must be found in the husband. Among the incidents of this property right so vested in him was the right not only to hold but to convey. To detract from this last by statute was to take away a property right. Mandelbaum v. McDowell 29 Mich. 78, 18 A. R., 61; Bruce v. Strickland 81 N. C. 267; Glandy v. Snydor 172 Mo. 333.

This very question was pres-nted in Spreckles v. Spreckles supra, It was there considered whether the husband's right could be disturbed by a statute passed subsequent to the ac-uisition of the property involved, requiring the wife to join in gifts of community property. It will be perceived that the only difference between that case and the case at bar is that the California statute required the wife's signature only in the case of gifts, whereas, our act of 1901 applies to all alienations. It was there held that the Statute was without effect as to previously acquired property.

A like question was present in the earlier California case of Ingoldsby v. Juan 12 Cal. 564, 579, where, in dealing with a similar state of facts it was said:

"But the subject of the act of the seventeenth of April was the separate property itself and that statute was passed to define and fix the relations of the parties to it; and by the sixth section the husband is made the manager of the separate property of the wife and then the power of sale by him is denied and the mode of sale fixed; but this only by obvious rules of construction, applies to separate property afterwards acquired or to property held, as separate, by women married after the passage of the act. The legislature had no power to affect marital regulations or rights fixed by law previously; and if they had, we are not to presume, in the absence of an express declaration to the effect, that they so intended."

A line of North Carolina cases further illustrate the prin-
66 ciple. In Sutton v. Askew 66 N. C. 145, it was held that where the wife had only an *inchoate* right of dower in her

husband's lands, subject to be defeated at any time by the husband's conveyance, subsequent legislation restoring her the common law right of dower could not affect the rights of the husband nor restrict his power of alienation nor confer upon the wife any additional right of dower in lands acquired by the husband before the act was passed, although held to apply to lands acquired subsequent to the act notwithstanding the marriage was before. Holliday v. McMillan, 79 N. C. 287; and in Bruce v. Strickland, 81 N. C. 198, it was said:

"The marriage took place and the title vested in the defendant previous to the restoration by statute of the common law right of dower and before the creation of a homestead in land. It was *then* in the power of the defendant by his deed to convey a *full and complete title in fee* to the land. Has this absolute dominion over his property been abridged by any act of subsequent legislation or could it be, under the principles of the constitution, without the owner's consent or consurrence? The value of property consists in its use, disposition and conversion into something else and these are the elements constituting a vested right which the legislative body cannot take away except for public use and then only making compensation to the owner. This security is guaranteed in the constitution of the United States in the clause declaring the obligations of contracts inviolable."

The Missouri cases of Moreau v. Detchemendy 18 Mo., 522 cited *supra* and Glandy v. Snydor 172 Mo. 319, are similarly in point. In the latter case, it was held that the right of the husband who acquired his homestead prior to the act of 1905 (requiring the joining of the wife in the conveyance) to sell the homestead without the wife's joining is a vested right and that he could notwithstanding such act alienate property acquired prior to it without joining his wife in the deed. It is very fully pointed out in that case that
67 the *jus dispondendi* no less that the *jus tenendi* is an element of property protected against legislative confiscation. The case of Westervelt v. Cregg 12 N. Y., 202, is similarly instructive.

We are of opinion, therefore, that the facts of this case when read in the light of the authorities bring it within the doctrine announced by this court in Newton v. Thornton, 4 N. M., 287, where, in construing our statute giving the value of improvements in ejectment to the party making them to be inapplicable to improvements erected prior to the act, it is said: "No legislature can take or destroy private property for private use by statutory enactments and so far as this statute attempts anything of that kind it is clearly void." We therefore hold that the act of 1901 does not apply to community property previously acquired and that as to such the husband's right of disposition is left intact.

The Judgment is accordingly affirmed.

WM. H. POPE,
Associate Justice.

We Concur:
WILLIAM J. MILLS, *C. J.*
JOHN R. McFIE, *A. J.*
EDWARD A. MANN, *A. J.*

Associate Justice Parker having tried the case below took no part in the decision.

68 No. 1166.

ABBOTT, *A. J.*, Dissenting:

In the judgment and opinion of the Court, I do not concur and, as the questions involved are highly important, I state my reasons for dissenting.

That the property rights of husband and wife in this Territory are, except as modified by local statutes, to be judged by the Spanish law in force at the time of its acquisition from Mexico, need not be questioned, if, by the Spanish law is meant the law as it existed in modified form in Mexico at that time. But I cannot agree that under the community system as it is here, the wife has, until the termination of the marriage relation, not vested or tangible interest in the community property, but "only a mere expectancy similar to that which an heir possesses in the estate of an ancestor," and that the husband's power over the community property is a vested interest in the property itself, and not subject to legislative interference. In my view, the wife, has a present, fixed and definite interest in the community property, determinable as to any particular item of it through alienation by the husband and in other ways and although he has the exclusive power of managing and selling the common property, that power is not a property right, but the authority necessary to the advantageous use of the property which, as a matter of public policy, may be intrusted to either or both of the parties to the community and changed from time to time as the Legislature may determine, and that in consequence, the statute Chap. 62 Sec. 6 Laws of 1907, by which the Legislative Assembly attempted to prevent the conveyance of community real estate by the husband without the consent of the wife, was a proper and valid exercise of power, as to real estate acquired before its passage as well as to that subsequently acquired.

In determining what the law was at the time of the acquisition of New Mexico there are doubtless unusual difficulties. Ballin-
69 ger in his work on Community Property Sec. 5, p. 26, says:

"The absence of an authoritative code of law in Spain leaves all legal subjects open to the varying definitions of the authors on the subject of Spanish legislation, and being devoid of that judicial interpretation found in Anglo Saxon countries leaves the subjects of the law in a similar uncertainty to that prevailing in the science of philosophy and metaphysics."

There is, besides, the impossibility of finding in the terminology of the common law system, words which exactly represent ideas and things which are peculiar to another system.

It has been said by a noted writer that it is impossible for anyone to put in words precisely what he thinks. If he cannot do that in his native language, how much further from accurate expression is he when he attempts to tell in his own language what another

thought and inadequetely expressed in another language. Especially is this the case when the whole way of thinking for centuries by the people using the one language has been so widely different from that of the people using the other, as that of the Spanish people has been from that of the Anglo Saxon on the subject here in question.

It plainly appears, I think, that some of our courts have forced the thoughts of Spanish law writers into verbal moulds of their own making and that they come to us in that somewhat distorted form.

No instance has been brought to our attention in which prior to the acquisition of Spanish territory by the United States, the right of the sovereign to change the method of administering community property has been denied. Nor is it suggested that any writer on the Spanish law has ever declared that the husband could not be deprived by law of the power of alienation which he had by the law. The possession of that power by the husband alone was not a necessary feature of the community system, since, as Ballinger says (section 3), in Gelderland, "The husband could not, without the wife's consent, alienate any part of the immovable property subject to the community." It is however alleged for the appellee, that
70 such is the necessary inference from the passages quoted from the writers on Spanish Law.

I find no such quotation either in the appellee's brief or in the majority opinion which seems to me to sustain or even favor that contention as against the doctrine that the husband is only the master of the community with power to alienate its property, with the possible exception of a passage cited from Tapia's Febrero, Title: Bienes Gananciales. That directly or indirectly furnishes the greater part of the material both for the foundation and superstructure of the argument for the appellee's position. It was cited in Guice v. Lawrence, infra, and practically made the basis of the opinion in that case, and in Panaud v. Jones, 1 Cal., 488, served a like purpose. In Van Maren v. Johnson, 15 Cal., 308, Judge Field's dictum that the interest of the wife during marriage, in the community property "is a mere expectancy like the interest which an heir may possess in the property of his ancestor" adopted by this Court in the case at bar, was based, by reference, on Guice v. Lawrence. Let us examine the passage on which so much has been made to depend. The citation is in English as quoted from Panaud v. Jones, supra.

"The wife is clothed with the revocable and *feigned* dominion and possession of one half of the property acquired by her and her husband during the marriage; but, after his death, it is transferred to her effectively and irrevocably, so that, by his decease, she is constituted the absolute owner in property and possession of the half which he left. The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the *Gananciales*, since, even during the marriage, he has in effect the irrevocable dominion, and he may administer, exchange, and although they be neither *castrenses* nor *quasi castrenses*, acquired by him, may sell and alienate them at his pleasure, provided there exists no intention to defraud the wife."

71 The Spanish has it thus: "A la mujer casada se comunica y transfiere en habito y potencia el dominio y posesion revocable y ficta de la mitad de los bienes que durante el matrimonio gana y adquiere con su marido; mas despues que este falece, se le transfiere irrevocable y efectivament, de suerte que por su fallecimiento se constituye dueña absoluta en posesion y propiedad de la mitad que deje, al modo que en los socios convenciales lo dispone le ley. Por este a la mujer no solo la esta prohibido donar sus bienes dotales y gananciales durante el matrimonio, sino tambien dar limosna sin licencia de su marido, excepto en cuatro cases. * * * El marido no necesita la disolucion del matrimonio para constituirse real y verdadero dueño de todos los gananciales, pues durante este tiene en el efecto su dominio irrevocable asi los puede administrar, trocar, y no siendo castrenses ni cuasi castrenses, vender y enagenar a su arbitrio, cesante el doloso animo de defraudar a su mijer, como se praeba de la ley."

There is so fas as I can learn no authoritative translation of Febrero's treatise. It is clear that the translation used in Panaud v. Jones, is, in some important particulars incorrect, and in others the meanings attributed to Spanish words are not necessary ones. Thus *"que este fallece,"* may mean, and according to Escriche, infra, a more reliable authority, should be, not the death of the husband, but the expiration of the marriage community, a very important difference. The adjective, *ficta*, which is translated "feigned" has also the meaning artificial and corresponds fairly to our word nominal. *Dueño*, translated "owner" has also the meaning, master. Judging from the fact that Escriche, in his very comprehensive Dictionary or Encyclopedia of Law, does not define or even mention it, the word has no established and recognized meaning in Spanish Law and was used loosely in the statement under consideration. The word *dominio* is here rendered "dominion" and properly so, I

72 think, but in Guice v. Lawrence the word "ownership" is used as its equivalent. In the Brief for the appellee the latter meaning is given to it in a citation from Escreche, with the effect of converting the citation into an authority for the appellee from one against him as it seems really to be. The citation, leaving that word in the original, is as follows: "The husband and wife have the *dominio* of the acquest property with the difference that the husband has it nominally and in fact and the wife only nominally, the fact becoming effective when the marriage is dissolved." Escriche Dic. Raz. de Leg. y Jur. Tom. 2 p. 86. The real meaning of the word dominio becomes therefore a matter of, perhaps, decisive importance. If its meaning is not, in that connection, ownership, but dominion, right of control and disposition, then Febrero and the cases founded on his authority do not aid the appellee's contention and Escriche is distinctly against it. That the latter rather than the former is its ordinary meaning the dictionaries inform us. Its meaning as used in law is given in the Cyclopedia of law and Procedure as, "The right or power to dispose freely of a thing, if the law, the will of the testator, or some agreement does not prevent." That definition is taken from the remarkable case of United States v.

Andres Castillero, which occupies almost half of the second volume of Black's Reports. The case is remarkable besides, from the fact as asserted in argument, that "In the bulk of the record and the magnitude of the interest at stake" it was probably "the heaviest case ever heard before a judicial tribunal," from the corresponding eminence of the counsel engaged in it, and the wealth of research and learning lavished upon it, by Court and Counsel.

Justice Wayne adopted and incorporated entire in his dissenting opinion, the opinion of Judge Ogden Hoffman, the District Judge, from whose judgment the case was appealed "as the best way of expressing my appreciation of the law and the merits of the case and of his judicial learning and research in connection with it."

73 Mr. Justice Catron, who with Mr. Justice Grier also dissented, spoke in even higher terms of praise of Judge Hoffman's learning. In Judge Hoffman's opinion as adopted by Justice Wayne, on pages 226-7 of the volume named, occurs the definition referred to and in connection with it a discussion of various Spanish terms employed to describe different interests in real property, quoted from Spanish writers. The opinion shows that "dominio" alone has the meaning already given, adopted by the Cyclopedia. Other words are added when it is desired to express full and compl-e ownership," as *"domino" pleno y absolute"* or *"con el dominio y propiedad,"* meaning "with the right of disposition and property" making the two elements of ownership distinct. While it is true that the opinion of Judge Hoffman did not prevail with the majority of the Supreme Court, there was nothing in the decision of that tribunal to detract from the eonimums on his learning by the dissenting justices, and the definitions he gives are besides cited from Spanish law writers of the hi-hest repute.

It is not claimed that the right of the wife to dominion and possession of half the common property was not revocable and artificial or as we should say, determinable or defeasible and nominal during marriage, nor that the husband was the real master of the community and its property.

All that might be consistently with her having a proprietary interest in it which other expressions of the Spanish and Spanish-Mexican treatises abundantly indicate that she had.

Thus it is said in Novisimo Sala, Mexicano, section 2 A, titulo 4, that a feature of marriage is "the acquisition for both spouses by the halves of that which each may gain during the marriage, so that all the property which the husband and wife may have belonged to both, one half to each *mius* that which either may prove to belong to him separately." Ballinger says pp. 384, 395, quoting from Schmidt's Civil Law "the law recognizes a partnership between the husband and wife as to the property acquired during mar-

74 riage." "Husband and wife are entitled to an equal share in the community although one of them should at the time of marriage have been without any means. At the same time, both are liable in equal proportions for the losses and debts during its existence." And of like tenor are all the statements I have found

from similar sources as to the effect of marriage in making the gains of the parties to it their common property. Indeed the very expression "community property" is a misnomer, if that is not the case, all the learned treatises on it are little better than waste paper, and the celebrated chapter on the natural history of Iceland "Concerning Snakes," might have been substituted for them with great gain in brevity and not muc*l* loss in substance. All that the decision of the court leaves of the system might have been expressed in a half dozen lines,—that if the wife survives the husband she shall have a certain share of the property of which he dies possessed which they gained during their marriage by onerous title. That it was something substantially more than that is shown by the fact that the wife's half subject to confiscation without affecting the half of the husband. Ballinger Com. Prop. p. 396; Escreche's Dic. Raz. de Leg. y Jur. pp. 86 et seq. Surely that which is nonexistent, or exists only as a mere expectance, if at all, cannot be reached by a present act of confiscation. Equally significant is the fact that on the decease of the wife half of the community property, subject to the payment of its debts, etc. went to her heirs. If up to the moment of her death her husband was the owner of it, how could it thereupon become a portion of her estate subject to the law of descent? And, finally, that the husband's power of alienation was that of an agent or trustee and not that of an owner, is manifest from the fact that the wife's interest in the proceeds of a sale made by him of community property was the same as in the property itself. In that respect her interest differs fundamentally from a wife's right of dower, which does not attach to the proceeds of the sale of the land in which the inchoate right existed.

75 The appellee places great reliance on Guice v. Lawrence, 2 La. Ann. 226: Let us examine its title to be considered authority by us. It was decided as far back as 1847, avowedly on the Louisiana Code, in a case in which the right of the husband to convey real estate of the community by pay- his separate debts contracted before marriage was involved. The widow claimed that she was entitled to one half of the community property remaining after the payment of the community debts, but the court held that the alienation by the husband was valid for the purposes of that case at least. The right to proceed against the heirs of her husband on the ground that the transfer was made in fraud of her rights was especially reserved to the widow by the court. As to the correctness of the decision itself I make no question, nor do I affirm that it would not have been correct if it had been based on the Spanish law. But the Court went beyond the requirements of the case to declare that the laws of Louisiana have never recognized any title to the wife during marriage to one half of the acquests, which may have been the case, and the provisions of the code on the subject are "the embodiment of the laws of Spain, without any changes" which is not admitted. The statement of Febrero already referred *referred* to is quoted to sustain that proposition. But that, as before stated, is not equivalent to saying that the husband is the owner of the community property. It declares only that he is the "master" of the community as indeed

the Court elsewhere states, and adds that he "has power to alienate the immovables which compose it by an encumbered title without the consent of permission of the wife."

As Ballinger points out (Sec. 6) the Louisiana Law on the subject is a hybrid. Louisiana became a French colony in 1700 with imported French laws. It was transferred by France to Spain in 1763, which led to more or less modification of the existing laws. It was returned to France in 1800 and the Code Napoleon became
76 the law of the land, but it could hardly have taken deep root since the Territory was ceded to the United States in 1803, in 1806-8 a code was adopted which was revised in 1882-4 and to it presumably reference is made by the Court in Guice v. Lawrence, supra. It should be born- in mind in this connection that it was not the Spanish law, as it was when Louisiana was a Spanish province, or before, which came with New Mexico, but that law as modified in Mexico, after her independence and very likely before, to some extent. That was the law of California as well as of New Mexico, but in that State has been changed by statute in essential particulars. The early California cases are so conflicting as to practically neutralize each other. In Panaud v. Jones, supra, as has been said, the doctrine of Guice v. Lawrence was adopted. But in Beard v. Knox, 5 Cal. 252, the Court said, "the wife's interest in the common property is a present, definite and certain interest." In Van Maren v. Johnson, the court, through Judge Field, made the declaration which this Court now adopts, that the interest of the wife was during marriage "a mere expectancy similar to that of an heir in the estate of his ancestor," citing Guice v. Lawrence, supra, as authority for that proposition. That statement was in the nature of a dictum as the question was whether the common property was liable for the debt of the wife contracted before marriage, and it was held in the affirmative. Not many years later it was said in Gody v. Gody, 29 Cal., 157, that although we had perhaps no better word than "expectancy for the wif-'s interest, yet her right is as well defined in contemplation of law even during marriage as that of her husband." Later radical changes were made in the statute law of the state and they should be taken into account in considering cases subsequent to them such as Spreckles v. Spreckles, 116, Cal., 339, on which the appellee lays so much stress. Of the California statutes Ballinger says (sec. 77) "The interest of the wife does not ripen into a legal right even upon her death, in California, for want of a statute making her estate entitled to it" and it was so held in Packard v. Aurellanes, 17 Cal., 539, on the ground that the
77 California statute on the subject merely designated the persons to whom half of the community property should go on the death of the wife, but did not make it a part of her estate. By statute, in 1861, it was distinctly provided that upon the dissolution of the community by the death of the wife, the entire community property should go to the husband, and it has since been added that it "shall go" to him "without administration," "except such portions thereof as may have been set apart to her by judicial decree for her support and maintenance." By those provisions the

wife's interest was indeed "a mere expectance" depending on her surviving her husband, and the decision in Spreckles v. Spreckles, supra, although not in terms based on the statute, was quite in keeping with it. As Beatty, C. J. said at the close of his opinion, concurring in the result, "if the husband survives the wife, he will get everything he had not voluntarily parted with." But no such conditions have ever obtained here, and why should we import conclusions when the premisses are lacking? says Ballinger, (Sec. 6) "The Territory of New Mexico seems to have borrowed the Spanish law of property rights of married persons in its entirety and with slight modifications." He adds: "The present condition of the laws of New Mexico and the difficulty of access thereto prevents an accurate statement of their provisions." This Court fortunately is not under that disability, and can easily resort to this uncorrupted source of information.

Section 2030 C. L., 1897, the existing statute law of the Territory, provides that "one half of the acquest property which remains after the payment of the common debts of the marriage, shall be set apart to the surviving husband or wife absolutely:" By Section 2031, it is provided that after the payment of the common debts, the deduction of the survivor's separate property, and his or her one half of the acquest property, and subject to the payment of the debts of the decedent, "the remainder of the acquest property and the separate estate of the decedent shall constitute the *body of the estate* for descent and distribution, and may be disposed of by will or
78 in the absence of a will shall descen*t* as follows: one fourth thereof to the surviving husband or wife, and the remainder in equal shares to the children of the decedent."

The power which the wife has under this statute to dispose of her share of the community property by will to take effect during the life of her husband makes her ownership distinct and certain. The statute even makes her husband one of the distributees, assuming to give him, if the view of the appellee is sound, what he already owns. It provides also that her share shall go to her children even though they are not his. No distinction is made between what remains of her separate estate, after deductions, and what remains of her half of the community property, but they are united to make up the "*body of the estate.*"

It is significant that this had been the statute law of the Territory, in essentials, from the beginning, in 1851. It was probably in the main an adoption of the Spanish-Mexican law, but it was made by those who had levied under that law and knew what it was at that time. From that time, whatever its origin it became the law of New Mexico to be interpreted by this court in accordance with the fair intent of its own terms and not to meet the views of other courts growing out of departures from the standard to which New Mexico has adhered. It gave the wife an interest widely different from "that of an heir in the estate of his ancestor." Until the interest of an heir in the estate of an ancestor who survives him will pass by his, the heir's will or descend to his heirs, the similarity declared in Van Maren v. Johnson, supra, lacks much of complete likeness.

Rather is her interest like that of a minor under guardianship, whose ownership is complete although his property is subject to control and alienation, as the law provides, but who has, in general, no power in himself either to manage or sell it, and will never have such power unless he happens to live to the age at which the law admits him to that right.

79 The statute in question is not the first assertion by the Territorial Assembly of its right to limit the power of the husband to alienate the community property, as far back as 1887 by chapter 37 of the Session Laws of that year, it was provided that the "wife and family" of a mortgagor should not lose their right of homestead through a mortgage in which she had not joined. Until now the validity of that law has not been questioned, in this court at least. If the wife is the present owner of a like equal interest with the husband in the community property although it is determinable by the exercise of his undoubted although not absolute right of sale, that fact goes far towards proving that the power which the law confers upon him by force of the marriage itself, is that of an agent, manager or trustee only.

The recent case of Garrozi v. Dastas, 204, U. S., 64, is cited for the opposite view, but I am unable to perceive how it affords it any support. Says the court, through Mr. Justice White, "the very foundation of the community and its efficacious existence, depend on the power of the husband in the absence of fraud, or express legislative restriction, to deal with the community and its assets as its owner * * * and not to render the community inept and valu-less to both parties by weakening the marital power of the husband as to his expenditures and contracts so as to cause him to be a mere limited and consequently inefficient agent."

No question is made that the husband, with the exceptions above stated has the same power to deal with the community property that he would have if he were "the owner" of the whole instead of being as to one half the "agent" or trustee of the owner. That the meaning of the court was not what is claimed for it is put beyond question, as it seems to me, in the opinion by the same Justice, himself, as the majority opinion suggests, presumably learned in the civil law, in Warburton v. White, 176 U. S. 484, sustaining the decision of the Supreme Court of Washington and commenting with

80 full approval on Holyoke v. Jackson 3, Wash. Ter., 235, Hill v. Young, 7 Wash. St. 33 and Mabie v. Whittaker, 10 Wash. St. 656, the three cases in which the Washington doctrine is fully and ably set forth. As this case is, to my mind, conclusive of the question, for this court, I quote from the opinion at length, including here instead of stating them apart, the extracts from the Washington cases referred to, which the learned Justice stamped with his approval in the course of his opinion: "The nature of common or community property, within the Territory of Washington, as such property was constituted by the act of 1873, and the operation of the act of 1879 upon property of that character acquired prior to the passage of the latter act was considered in 1882 in the case of Holyoke v. Jackson, 3 Wash. Ter. 235. The question for decision in that

case was whether, while the act of 1879, was in force, a husband could, without his wife joining, make a valid contract to sell community property acquired prior to 1879. In deciding this question in the negative the court, in the course of the opinion, said (p. 238) "By the provisions of the husband and wife acts passed in 1879, and previously, the husband and wife were conceived as constituting together a compound creature of the statute called a community. * * * In it the proprietary interest of husband and wife are equal; and those interests do not seem to be united merely, but unified; not mixed or blent, but identified. It is *sui generis*—a creature of the statute. By virtue of the statute this husband and wife creature acquires property. That property must be procurable, manageable, convertible and transferable in some way. In somebody must be vested a power in behalf of the community to deal with and dispose of it. * * * Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of
81 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband and lay it upon the husband and wife together. As the husband's "like absolute power of disposition as of his own separate estate," bestowed by the ninth section of the act of 1873, was a mere power conferred upon him as a member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and his wife conjointly. This was done.'

In Hill v. Young, 7 Wash. St. 33, it was decided that the husband's power to dispose of the common property was not a vested right which would not be taken away by subsequent statute. In the subsequent case of Mabie v. Whittaker, 10 Wash. St., 656, the provisions of the law of 1869 were again considered. Land had been purchased on August 10, 1871, by one Mabie, with community funds, during the existence of the act of 1869. While Mabie held the legal title, the legislature repealed the act of 1869, and on November 29, 1871, an act was approved which, in section 12, provided that the husband should have the management of all the common property, but *but* should have the right to sell or incumber real estate without the joinder of his wife. * * * The court, however, said: 'But, leaving out of consideration all question as to whether he could only exercise such right while his wife was living, and could not convey the entire title, under the former law, after her death, and cut off her heirs, we think the subsequent act took away his power to do so. It was immaterial whether the record title of the community lands be in the name of the husband or the wife, or of both of them, when considered with reference to the power of the legislature to authorize either or both of them to convey. The legislature could as well have provided that the wife could convey, as the husband; and if it had power to say that either could dispose

of the community interest of the other, it could say that
82 neither could do so. Changing the manner of the conveyance did not alter the status of ownership. It could not make the interest of either spouse in community lands greater or less.' * * *

"The statute of 1871 did not undertake to divest any right which had become vested. Mabie, receiving this conveyance under the act of 1869, thereby became the owner of an undivided one half interest in the land, and his wife thereby became the owner of the other half. Her right was as much a vested right as his.'"

Following the quotations from the Supreme Court of Washington, of which the foregoing are exce-pts, the opinion proceeds as follows:

"The rule announced in the foregoing cases was reiterated in the opinion delivered in the case at bar, it being held that Bacon did not become the sole owner of the property in question by the purchase in 1877, but that it became an continued community property so long as the community existed, and that the descent of such property was subject to regulations at will by the legislature."

"Now, it cannot in reason be denied that the decision from which we have just quoted held that the purpose of the legislature of Washington, whether territorial or state, in the creation of community property, was to adopt the features essentially inhering in what is denominated the community system—that is, that property acquired during marriage with community funds became an acquest of the community and not the sole property of the one in whose name the property was bought although by the law existing the husband was given the management, control and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community. The proceeds of the property when sold by him becoming an acquest of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community." * * *

"Obviously, the reasoning of the plaintiff in error, upon which the
83 assumption that community property brought during the existence of the act of 1873 was solely the property of the husband, involves not only a contradiction in terms but invokes at the hands of this Court, in order to overthrow the rule of property in the State of Washington, an interpretation of the statutes of that State which is not only confusing, but self-destructive. It cannot be doubted, under the text of the act of 1873, the property relations of husband and wife were controlled by what is denominated the community system, and that in consonance therewith the statute referred to treated property acquired during marriage with community money as community or common property. Although this is patent, the argument is that the provision in the statute giving the administration and disposition of the community property to the husband operated to destroy the community system and render it impossible, under the statute, for community or common property to exist. In other words, the interpretation relied upon asked us to say that because of a provision which simply pointed out

how common property should be administered, it resulted that there was no common property to be administered. This would be but to declare that the statute brought about a result which was contrary to its express language, providing for the existence of the community system. It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property."

How this Court's view of the nature of the rights of husband and wife in the community property, as stated in the majority opinion, is to be reconciled with what Mr. Justice White, speaking for a unanimous court here says, I am unable to perceive. When it is said by way of attempted distinction that Warburton v. White rests on a statute of Washington, it should be added that the statute provided that the husband should have the entire management and control of the common property "with the like absolute
84 power of disposition so as of his own separate estate," quite as clear and explicit a statement of his *dominio* as the Spanish law furnishes.

The general principle on which such legislation as that in question is based is well stated in Baker, Executors v. Kilgore, 145 U. S., 287-490. "Moreover his (the husband's) right prior to that enactment did not come from contract between himself and his wife, or between him and the state, but from a rule of law established by the legislature and resting alone upon public considerations arising out of the marriage relation" * * * "The relation of husband and wife is therefore formed subject to the power of the state to control and regulate both that relation and the rights directly connected with it by such legislation."

That it is a wise and beneficent measure of public Policy which confers on the wife the power to protect herself and her children, to some extent against the improvidence, caprice or purposely harmful conduct of the husband, by withholding her assent to the alienation of their homestead, or other real estate, few would question. It is the established policy of nearly, or quite all the states of the Union.

The decision of the Court renders ineffective Chapter 62, Sec. 5 of the acts of 1901, and by necessary inference Chapter 37, Sec. 16, of the acts of 1907, which in part supersedes it but which makes the assent of the wife essential to a valid conveyance of the homestead, so far as either may relate to real estate acquired before its enactment. This is a result greatly to be deprecated and one which we all, doubtless, agree should not be brought about by this Court, unless it is constrained thereto in obedience to plain principles of law. Certainly no law of the Territory, or decision of the Supreme Court of the United States, or previous decision of this Court,
85 constrains us to that course. To say the least the decisions of the other courts to which the judgment of this Court is

now made to conform are, in my opinion, open to such serious doubt that they should not be followed to reverse the express will of the legislative branch of the government.

IRA A. ABBOTT,
Associate Justice.

TERRITORY OF NEW MEXICO,
Supreme Court:

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the above and foregoing eighty-four pages and six lines, contain a true full and complete copy of the record and proceedings, pleadings and opinion in the above entitled cause, as the same appear on file and remain of record in my office at Santa Fe, New Mexico.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the fifteenth day of September, A. D., 1908.

[Seal Supreme Court, Territory of New Mexico.]

JOSE D. SENA,
Clerk Supreme Court of New Mexico.

86 In the Supreme Court of the Territory of New Mexico.

No. 1166.

D. M. READE, Appellee,
vs.
PILAR S. DE LEA, Appellant.

Appeal from District Court, Dona Ana County.

Affidavit of Value of Matter in Dispute.

TERRITORY OF NEW MEXICO,
County of Socorro, ss:

Aron H. Lea, of lawful age, being first duly sworn, upon his oath deposes and says: that he is one of the appellants in the above entitled cause; that he is well acquainted with the real estate and property involved in this cause, the same being claimed in whole by the Appellee in this cause on the one hand, and by the Appellants on the other; same being described as follows: The north east quarter of the north east quarter and the lots numbered one (1), five (5), six (6) and eight of section twenty-four (24) in township twenty-one (21) south, of range one (1) West of New Mexico Meridian, containing one Hundred and sixty three acres (163.) and fifty-eight hundredths of an acre (58), being the same land patented to Adolfo Lea by the United States of America on June 14th, 1893, Homestead entry certificate No. 924: Also lot numbered (1) of section (23) and lots numbered two, three, four and seven of section twenty

four (24) in township twenty-one (21) south of range one (1) west of New Mexico Meridian, containing one hundred and fouty-four and five hundredths (144.05) acres, being the land patented to Eusebio Tapio by the United States of America on July 30th, 1891, Homestead certificate No. 1679, all land situated in Dona Ana County, Territory of New Mexico; that he is well acquainted with the value of said premises and real estate and that the reasonable market value thereof and the matter in dispute in this cause exceeds the sum of Five Thousand ($5,000.00) Dollars, exclusive of all costs in this cause; that this affidavit is made for the purpose of appealing said cause to the Supreme Court of the United States of America from the judgment and decree rendered in said
87 Supreme Court of the Territory of New Mexico on February 26th, 1908, and from the further judgement and decree thereof overruling Appellants' motion for rehearing but correcting the record as to parties Appellant, rendered September 2nd, 1908.

AARON H. LEA.

Subscribed and sworn to before me this 19th day of September, A. D. 1908.

[NOTARIAL SEAL.] ANTON MAYER,
Notary Public in and for the County of Socorro, Territory of New Mexico.

My Commission expires September 16, 1909.

Endorsed on cover: File No. 21,406. New Mexico Territory Supreme Court. Term No. 98. Theresa Arnett, Katie Reade, Robert Lea, Mary Buquor, and Aaron H. Lea, appellants, vs. D. M. Reade. Filed November 10th, 1908. File No. 21,406.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 98.

THERESA ARNETT, KATIE READE, ROBERT LEA, MARY BUQUOR, AND AARON H. LEA, APPELLANTS,

vs.

D. M. READE, APPELLEE.

BRIEF OF APPELLANTS.

Statement of Facts.

This cause originated by a suit to quiet title, brought by appellee, D. M. Reade, against Pillar S. de Lea, in the District Court of the Third Judicial District of the Territory of New Mexico sitting in and for the county of Dona Ana. The said cause was decided by said court in favor of said D. M. Reade; whereupon the said Pillar S. de Lea appealed to the Supreme Court of the Territory of New Mexico.

While this cause was pending before said last-named court the said Pillar S. de Lea, who was the appellant, died (to-wit, on the 21st day of December, A. D. 1906). Thereupon, by suggestion to the court, the heirs of said Pillar S. de Lea,

to-wit, Theresa Arnett, Katie Reade, Robert Lea, Mary Buquor, and Aaron H. Lea, were substituted as appellants in the place and stead of said Pillar S. de Lea, deceased.

The Supreme Court of the Territory of New Mexico decided this cause in favor of said appellee, D. M. Reade, and confirmed the judgment and decree of the lower court. The said Theresa Arnett, Katie Reade, Robert Lea, Mary. Buquor, and Aaron H. Lea, appellants, thereupon appealed to this court, being the above-entitled cause now submitted for argument.

The said Pillar S. de Lea and Adolpho Lea were married in December, 1851, in New Mexico. While both were living and during coverture, and while the original law of community property was in existence without statutory modification, and as it was in force when New Mexico was ceded to the United States, the following-described real estate and property were acquired in the name of the said Adolpho Lea, to wit: Lots one (1), five (5), six (6), and eight (8) of section twenty-four (24), in township twenty-one (21) south of range one (1) west of New Mexico meridian, the same having been patented to said Adolpho Lea by the United States of America on June 14, 1893; and also lot one (1) of section twenty-three (23), and lots two (2), three (3), four (4), and seven (7) of section twenty-four (24), in township twenty-one (21) south of range one (1) west of New Mexico meridian, the same having been conveyed to said Adolpho Lea by one Eusebio Tapia on April 6th, 1889. Under the original community law extant in New Mexico up to 1901, the husband had the power to alienate community property without the signature or consent of the wife, but in 1901 it was provided by statute that both husband and wife should join in the conveyance of community property. On the — day of April, A.D. 1902, and prior to his death, and without the knowledge of his wife, and while the above-mentioned statute was in force, the said Adolpho Lea executed a deed purporting to transfer and convey the above-described real

estate and property to the appellee, D. M. Reade, but to which deed the said Pillar S. de Lea, then and there being the lawful wife of said Adolpho Lea, did not join in the execution thereof.

The said Adolpho Lea died intestate on the 23d day of April, 1902, in Dona Ana County, New Mexico.

Since the time of their marriage and up to the time of the death of the said Adolpho Lea, the said Adolpho Lea and the said Pillar S. de Lea were husband and wife, and the said Pillar S. de Lea was the surviving wife of the said Adolpho Lea after his death and until her demise, as aforesaid. The appellants in this case are the heirs of the said Pillar S. de Lea.

While this cause was pending in the district court above mentioned it was submitted upon an agreed statement of facts, embodying the facts above set forth, for a hearing in law before the court, and this cause comes before this court in the same manner.

After the said Supreme Court of the Territory of New Mexico rendered its decision as aforesaid, a motion for rehearing was filed by the appellants, which was subsequently denied by said Supreme Court; said motion is likewise before this court, and the lower court's denial of same is here for review.

Assignment of Errors.

The appellants make the following assignment of errors:

1. That the Supreme Court of the Territory of New Mexico erred in affirming the judgment and decree of the court below.

2. That the said Supreme Court of the Territory of New Mexico erred in adjudging and decreeing that the estate in fee simple in the following-described tracts of land and real estate be established in favor of the appellee D. M. Reade, and against the adverse claims of the appellants, Theresa

Arnett, Katie Reade, Robert Lea, Mary Buquor, and Aaron H. Lea, to wit: The northeast quarter of the northeast quarter and the lots numbered one, five, six, and eight of section twenty-four, in township twenty-one south of range one west of New Mexico meridian, containing one hundred and sixty-three and fifty-eight hundredths of an acre, being the same land patented to Adolpho Lea by the United States of America on June 14, 1893, homestead entry certificate No 924; also lot numbered one of section twenty-three, and lots numbered two, three, four, and seven of section twenty-four, in township twenty-one south of range one west of New Mexico meridian, containing one hundred and forty-four and five hundredths acres, being the land patented to Eusebio Tapia by the United States of America on July 30, 1891, homestead certificate No. 1679.

3. That the said Supreme Court of the Territory of New Mexico erred in adjudging and decreeing that the said appellants be barred and forever estopped from having or claiming any right or title to the said premises adverse to said appellee.

4. That the said Supreme Court of the Territory of New Mexico erred in adjudging and decreeing that the appellee's title to the said premises be forever quieted and set at rest.

5. That the said Supreme Court of the Territory of New Mexico erred in adjudging and decreeing that the appellee have and recover of and from the appellants his costs in this cause incurred and expended to be taxed.

6. That the said Supreme Court of the Territory of New Mexico erred in denying the motion of the appellants for a rehearing in the said cause.

By reason whereof, appellants pray that the judgment and decree made and entered by the Supreme Court of the Territory of New Mexico be reversed.

Question of Law.

The real estate and premises in dispute having been acquired by Adolpho Lea, deceased, during his marriage with Pillar S. de Lea, deceased, was community property, same not having been acquired by said Adolpho Lea through inheritance, donation, legacy, etc.

Compiled Laws of New Mexico (1897), section 2030.
Compiled Laws of New Mexico (1884), section 1411.
Barnett *vs.* Barnett, 9 N. Mex., 205.
Crary *vs.* Field, 9 N. Mex., 222.
Nov. Sala Mexicana, sec. 2*a*, tit. IV., par. 1 (*infra*).
Febrero, lib. I, cap. IV, sec. I, par. 1 (*infra*).
Novísima Recopilacion, lib. X, tit. IV., Ley I, II, V (*infra*).
Ballinger on Community Property, sec. 19.

The rules of community property law as they existed in New Mexico at the time said Territory was ceded to the United States still prevail, except in so far as changed or modified by statute.

Chavez *vs.* McKnight, 1 N. Mex., 147.
Barnett *vs.* Barnett, 9 N. Mex., 205.
Crary *vs.* Field, 9 N. Mex., 222.
Strong *vs.* Eakin, 11 N. Mex., 107.

By statute enacted March 20, 1901, the husband and wife were required to join in the execution of conveyances of community real estate.

Session Laws of 1901 (New Mexico), sec. 6 of chapter LXII.

It is contended that previous to the enactment of the foregoing statute, under the original community property law, the right to convey and alienate community property vested in the husband solely, and that this was an absolute and

vested right; and that, if the above statute is to be considered operative and in force as to the premises in dispute, it will be retroactive, will impair the obligation of contract, and deprive the appellee of vested rights without due process of law.

This contention appellants deny.

Appellants, furthermore, contend that this statute does not affect the vested interests of the husband and wife in ganancial property under the Spanish law and only limits the husband's power of administration over the wife's interest, a change of agency, a reasonable requirement and improvement in the law. to protect the wife's interest against fraudulent transfers which sometimes are difficult to prove and imposes no hardship on the husband, inasmuch as should the wife refuse to join in a deed she may be compelled to do so by judicial order, unless good and sufficient reasons are shown, such as would invalidate the transfer under the old Spanish law.

Said statute appears to have had as a basis similar reasons which caused the enactment of articles 2025 and 2026 of the civil code of the State of Chihuahua, Mexico, and like provisions in the civil code of the Mexican Federal District and Territories, which are a decided step forward in the progress of the law (*infra*).

The question of law, therefore, which is presented is this:

IS SUB-DIVISION (*a*) OF SECTION 6, CHAPTER LXII OF THE NEW MEXICO SESSION LAWS OF 1901, UNCONSTITUTIONAL AND THEREFORE VOID AND OF NO EFFECT AS TO COMMUNITY PROPERTY EXISTING PRIOR TO ITS ENACTMENT UNDER DATE OF MARCH 20, 1901, SAID STATUTE BEING AS FOLLOWS:

> "NEITHER HUSBAND NOR WIFE SHALL CONVEY, MORTGAGE, INCUMBER OR DISPOSE OF, ANY REAL ESTATE, OR LEGAL OR EQUITABLE INTEREST THEREIN ACQUIRED DURING COVERTURE BY ONEROUS TITLE, UNLESS BOTH JOIN IN THE EXECUTION THEREOF"?

ARGUMENT AND AUTHORITIES.

I.

As to community property, the husband and wife constitute a society, association, partnership or company.

The husband is not the sole and absolute owner of community property.

While the husband had power to alienate community property without the wife joining in the conveyance, this power was that of an administrator or trustee of the conjugal society, association, partnership or company.

The interest of the wife is more than a mere expectancy.

Each consort has an equal half interest in community property.

A. American authorities in support of above propositions and comment thereon.

Holyoke *vs.* Jackson (1882), 3 Wash. Ter., 235; s. c., 3 Pac., 841. (Facts same as case at bar.)

In adopting the community system a State is bound by the principles thereof according to the established rules of the country or State from whence adopted. (Similar to the rule that in adopting a statute from another State the construction thereof is likewise adopted. Reymond *vs.* Newcomb, 10 N. Mex., 151.)

Hill *vs.* Young, 7 Wash., 33; s. c., 34 Pac., 144.

Warburton *vs.* White, 176 U. S.,484; s. c., 44 Law Ed., 555.

Ballinger on Community Property, sec. 255.

Lichty *vs.* Lewis (1894), 63 Fed., 535 (Wash.).

Mabie *vs.* Whittaker (1894), 10 Wash., 656; s. c., 39 Pac., 172. (Point of law similar to case at bar.)

1. HUSBAND CANNOT DISPOSE OF BY WILL MORE THAN HALF OF THE COMMUNITY PROPERTY.

Beard *vs.* Knox (1855), 5 Cal., 252-256; s. c., 63 Am. Dec., 125.
Also *In re* Buchanan's Estate, 8 Cal., 507.
Also Walton's Civil Law, art. 1414, p. 378.
Also Spanish and Mexican authorities (*infra*).
Also Thompson *vs.* Cragg, 24 Tex., 582 (*infra*).
Also Schmidt's Civil Law of Spain and Mexico, art. 52.

"The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death." * * * Beard *vs.* Knox (*supra*).

2. THE LAW IN VESTING IN THE HUSBAND THE ABSOLUTE POWER OF DISPOSITION OF COMMUNITY PROPERTY DESIGNED TO FACILITATE BONA FIDE ALIENATION AND TO PREVENT CLOGS BY CLAIMS OF WIFE.

Smith *vs.* Smith (1859), Field, J., 12 Cal., 217; s. c., 73 Am. Dec., 533.
Also De Godey *vs.* De Godey, 39 Cal., 157 (*infra*).
Also Spanish and Mexican authorities (*infra*).

3. UPON THE DISSOLUTION OF MARRIAGE BY DIVORCE, THE WIFE IS ENTITLED TO HALF OF THE COMMUNITY PROPERTY.

Smith *vs.* Smith (*supra*).
De Godey *vs.* De Godey, 39 Cal., 157 (*infra*).
Galland *vs.* Galland, 38 Cal., 265.
Schmidt's Civil Law of Spain and Mexico, art. 56.
Spanish and Mexican authorities (*infra*).

4. THE BASIS AND ESSENCE OF COMMUNITY PROPERTY IS THAT THE INDUSTRY AND CONTRIBUTIONS OF BOTH SPOUSES CREATE THE FUND.

Meyer *vs.* Kinzer (1859), Field, J., 12 Cal., 248.
Also De Godey *vs.* De Godey (*infra*).
Also Galland *vs.* Galland (*infra*).
Also Johnston's Civil Law of Spain, p. 67.
Also McKay on Com. Pro., sec. 168.
Also Spanish and Mexican authorities (*infra*).
Also Ballinger on Com. Pro., sec. 11.

5. THE HUSBAND'S POWER TO DISPOSE OF COMMUNITY PROPERTY IS BECAUSE HE IS THE HEAD OF THE COMMUNITY. AS SOON AS HE CEASES TO BE THE HEAD, AS IN CASE OF DIVORCE, HIS POWER FAILS.

De Godey *vs.* De Godey (1870), 39 Cal., 157.

"Under the provisions of the statute, property which is acquired during the marriage, unless acquired by gift, bequest, devise, or descent, is common property. It belongs to the matrimonial community, and *not less to the wife than to the husband.* It is true that the interest of the wife therein pending the marriage has been termed 'a mere expectancy' * * * ; but while perhaps, no other technical designation would so nearly define its character, *it is, at the same time, an interest so vested in her,* that the husband cannot deprive her of it by his will * * * nor voluntarily alienate it for the mere purpose of devesting her of her claims to it. * * * The *theory* upon which the right of the wife is founded * * * is, that the common property was *acquired by the joint efforts* of the husband and wife, and *should be divided between them* if the marriage tie is dissolved either by the death of the husband or by the decree of the court, etc. Her mere *right* in the community property is as *well defined and ascertained* in contemplation of law, even *during the marriage,* as that of the husband. It is true that the law confers upon the latter the authority to man-

age and control it during the existence of the marriage, and the power to sell it for the *benefit of the community,* but not, as we have seen, *so as to defraud the community of it.* In the case at bar, then, the right of the respondent to a share of the property in question, if it be proven to be community property, is clear. It accrued to her, *as having been acquired in part by her own efforts,* before the decree of divorce was rendered; that decree as rendered did not deprive her of it. The effect of the decree, acting upon her personal status, was to remove from her the disability, theretofore, as we have said, almost total, to sue concerning it, not to interfere in anywise in its control. Under the operation of that decree, too, the appellant, ceasing to be 'husband' was *no longer the head of the community,* which had itself ceased to exist, and as a consequence, he lost the exclusive control and the somewhat absolute power of the community property; thenceforth the parties stood upon equal grounds in that respect, and neither could wholly exclude the other from a participation in the property and its present disposition."

De Godey *vs.* De Godey (*supra*).

Also Spanish and Mexican authorities (*infra*).

6. THE TERM "A MERE EXPECTANCY" IS A TERM NOT TO BE TAKEN LITERALLY.

De Godey *vs.* De Godey (*supra*).

7. THE WIFE'S RIGHT OF DOWER DEPENDS UPON WHETHER OR NOT THE WIFE SURVIVES THE HUSBAND, BUT WIFE'S RIGHT IN COMMUNITY PROPERTY DOES NOT.

Galland *vs.* Galland (1869), 38 Cal., 265.

"At the common law, the wife had no interest except her right of dower in the estate of the husband, acquired either before or after the marriage. The right of dower depended on the fact, whether or not she survived the husband. Even her own estate, unless settled to her sole use, became, to a great degree,

merged in his. But under the laws of this State, the wife not only retains her separate property, but that which is earned during the marriage *becomes the common property of the husband and wife;* and though it is subject to his control, *as the head of the family,* whilst the marriage continues, yet, if the wife survives him, or if the marriage relation be dissolved by a decree of the court, except for the adultery or extreme cruelty of the wife, she is entitled to one-half of the common property then remaining. The *theory* on which this right is founded is, that the common property *was acquired* by the *joint efforts* of the husband and wife, and *should be divided* between them, if the marriage tie is dissolved either by the death of the husband, or by the decree of the court, unless the wife shall have forfeited her right by committing an act of adultery, or extreme cruelty; * * * With these liberal provisions for the wife, *who has a joint and equal interest with the husband in all property acquired during the marriage,* it would be an anomaly." * * *

Galland *vs.* Galland (*supra*).

8. UNDER THE FRENCH LAW UNTIL THE MARRIAGE IS DISSOLVED, OR THE COMMUNITY OTHERWISE TERMINATES, THE WIFE HAS NO RIGHT WHATEVER; SHE HAS NOTHING BUT A MERE EXPECTANCY.

Dixon *vs.* Dixon's Executors (*infra*).

The admission of counsel for appellee in Garrozi *vs.* Dastas, 204 U. S., 81, as to a similarity of provisions of the Code Napoleon and the Spanish law prior to the civil code of 1889, as to community property, is apt to be misleading, if not in error (*infra*).

DISTINCTION BETWEEN THE FRENCH AND SPANISH LAW.

9. BUT THE LAW OF COMMUNITY PROPERTY AS KNOWN IN SPAIN WAS NOT DERIVED FROM THE FRENCH OR FROM THE ROMAN LAW, AND UNDER THE SPANISH LAW THE RIGHTS OF HUSBAND AND WIFE IN COMMUNITY PROPERTY GROW OUT OF THE MARRIAGE CONTRACT, AND DO NOT ORIGINATE IN ITS DISSOLUTION.

In order to clearly understand this difference, let us look at the source of the Spanish law.

> "The latter remarkable and original code, the Fuero Juzgo, had for its basis a multitude of institutions purely Germanic, such as the property of the conjugal community (gananciales), and advantages (mejoras) which even today are of much importance in Spanish civil legislation."
>
> Walton's Civil Law in Spain, etc., pp. 32-33, 42-43.

From which it appears that the law of *gananciales* was an unwritten law of the early German tribes, brought into Spain by the Visigoths and first reduced to writing in the Code of Euric or Tolosa (466-484 A. D.), only recently discovered (*id.*, pp. 42-43), which accounts for the history of this law and code not being mentioned by Schmidt and other early writers on the Spanish civil law, as well as its lack of full consideration in the earlier decisions of the Louisiana courts.

> "*Gananciales* were unknown in the Roman laws; they were barely mentioned in the Code of Alaric, etc."
>
> "They are included in the Forum Judicum (16 tit. 2, lib. IV), and appear to pertain to the reign of Recesvint * * *; are undoubtedly of German

origin and custom and are the first that governed this institution, establishing it in one of the most ancient legal works of Europe which sanctioned it (La ley de los Visigodos, Lex Wisigothorum, etc.)."

See also Walton, above, pp. 42-43.

"* * * *Las tribus Germanas* were the first who adopted the idea of community of property between the spouses, it being the signal characteristic of all the legislation founded on the principles of the Germanic law, while the notion of an absolute separation of the property of the husband and of the wife characterized the marriage of the Romans, * * * and if it still exists in Spain and Portugal, notwithstanding the Roman base of legislation of these peoples, it is as a reminiscence of the Germanic tribes which invaded and conquered the Iberian Peninsula."

"From the time of the Fuero Juzgo to the civil code, and even after the latter, the institution of *gananciales* has continued in force amongst the laws of Castile. * * *

"* * * The property of the conjugal community belongs while it exists, and afterwards individually, to each of the spouses *by halves*, * * *; from which the ancient experts deduce that the distinction of dominion *in habitu* which the wife has and the dominion *in actu* which the husband has in the ganancial property, is because one was proprietor without administration, and the other proprietor with it, etc."

Estudios de Derech Civil por Felipe Sanchez Román, tomo quinto (2 ed.), vol. I, pp. 339-340, 818, 820, Madrid, 1898.

This ownership by halves of the husband and wife in ganancial property under the Spanish law, prior to the adoption of the civil code of 1889, is further confirmed by a decision of the Supreme Court at Madrid (Sentencia, 28 Enero, 1898; Gac. 26, Febrero, p. 135), which case involved real estate, and it was held that, under the law of *gananciales* (ley 4, tit. 4, lib. 10, Nov. Recop.), the property belonged

to the husband and wife by halves. The language is as follows:

> "Considerando, por ultimo, que no prevaleciendo el recurso por los fundamentos relativos á la prueba, no pueda resultar violada por el fallo la ley 4, tit. 4, lib. 10 de la Nov. Recop., en la que se establece que los bienes que han marido y mujer *son de ambos por medio*, salvo los que probase cada uno que son suyos apartadamente."

The latter clause relating to individual property of either consort brought to the marriage.

Dixon *vs.* Dixon's Executors (*infra*).
Also White's New Recopilacion, p. 60, n. 43.
Also McKay on Com. Pro., p. 36.
Also Spanish and Mexican authorities (*infra*).
Moran & Carlton's Partidas, p. XV.
Novísima Sala Mexicana, par. 1, of sec. 2*a*, Tit. IV (*infra*).

10. UPON DEATH OF THE WIFE HER HEIRS INHERIT HER SHARE OF THE COMMUNITY PROPERTY. AN INHERITABLE INTEREST PASSES. HOW COULD THEY INHERIT UNLESS THEIR ANCESTOR WAS OWNER?

Dixon *vs.* Dixon's Executors (1832), 4 La., 188; s. c., 23 Am. Dec., 478.
Also Thompson *vs.* Cragg, 24 Tex., 582 (*infra*).
Also Crary *vs.* Field, 9 N. Mex., 222 (*infra*).
Also Upton and Jennings' Civil Laws of La., art. 2392.
Also Spanish and Mexican authorities (*infra*).

> "The rights of heirs arise from the death of the ancestor. The rights of husband and wife in the partnership of gains grow out of the marriage contract, and do not originate in its dissolution; * * * We are aware the principles here recognized do not correspond with the doctrines taught by the highest authorities in the French law. * * * They hold that the wife has no right whatever until the mar-

riage is dissolved, or the community otherwise terminates. That she has nothing but a mere hope or expectancy. * * * But it is not for us to deny, or even doubt, the correctness of their conclusions in relation to the law of France. It is sufficient that it is not the same as ours, and that the difference is marked on this very point."

Dixon *vs.* Dixon's Executors (*supra*).

"It cannot be doubted, under the text of the act of 1873, the property relations of husband and wife were controlled by what is denominated the community system. * * * *It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquet during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community.* * * *"

Warburton *vs.* White (1900), 176 U. S., 484; s. c., 44 Law Ed., 555.

Garrozi *vs.* Dastas (1906), 204 U. S., 64; s. c., 51 Law Ed., 369.

Garosi *vs.* Garosi, 1 Porto Rico Fed. Rep., 230.

Aran y Aran *vs.* Fritze, 3 Porto Rico Fed. Rep., 509.

Martinez y Nadal *vs.* May (1909), 5 Porto Rico Fed. Rep., 582.

The case last above arose under a state of facts similar to those presented in the case at bar, and the identical point of law was in issue.

Scott *vs.* Maynard (1843), Dallam's Decisions (Tex.), 548.

11. UPON DESERTION OF THE HUSBAND THE WIFE MAY ADMINISTER AND SELL COMMUNITY PROPERTY.

Wright *vs.* Hays (1853), 10 Tex., 130; s. c., 60 Am. Dec., 200.

Also Codigo Civil (Chihuahua), art. 1903 (*infra*).

Also Civil Code of Mexican Federal District and Territories, art. 2031 (*infra*).

Also Walton's Civil Law, art. 1441, p. 382.

Also Schmidt's Civil Law, art. 42.

"The marriage being contracted under the laws of Spain, and those laws, and those operating during the greater portion of the absence of the husband, it may be proper to state the incidents of marriage, as affecting property, under those laws. By them the husband had the free disposition (if not made in fraud of the wife) of all the community property; and the proceeds of the separate property of both the wife and the husband fell into and became a portion of the common property. * * *"

"It appears, then, that the rights and duties of the husband are reciprocal. If he be vested with high powers, he is subject to corresponding duties. As the land in question may be taken (at least for this inquiry) as a portion of the community acquisitions, our attention will be directed to the rights and obligations of the husband and wife in reference to such property. Their rights of property in the effects of the community are *perfectly equivalent to each other.* The difference is this, that during coverture her rights are passive; his are active. He has the free *administration* and disposition (if untainted by fraud against the wife) of such property; and he is subject to the corresponding duty of maintaining his wife and family, and defraying out of this property the debts contracted during marriage. So long as he discharged his duty as a husband, his superior rights remain unquestionably in full vigor. But when he abandons the administration of the common property, deserts his wife and country; when he ceases the discharge of his duties, and contributes in no

mode to the support of his wife and family; reducing the wife to the necessity of providing for them, and of taking care of the common property, or otherwise suffering it to go to waste; and when this absence is prolonged several years—do not his rights over the effects of the community, from the nature of things, cease? and are not the passive rights of the wife quickened into vigorous activity?"

"She is necessarily compelled to assume the position of the husband; to discharge his duties and incur his responsibilities; and her power should correspond to the position by the default of the husband, she is thus compelled to assume; and especially should the controlling power of the husband over the goods of the community be transferred to the wife. *Her right in that property is equal to that of the husband.* During his presence he has the administration, subject to the trusts, incumbent upon the property. This right of control must necessarily cease where he can and will no longer exercise it; and the wife, *the other joint owner,* must be vested with the authority, or it cannot exist anywhere. * * *"

"But if they belong to the community" (the acquisitions made by the wife during desertion of the husband) "his desertion of wife and country vests in her the administration of such property, and confers upon her every right of control or disposition which he could have enjoyed or exercised had he remained in the discharge of his duties as a husband."

Wright *vs.* Hays (*supra*).

Thompson *vs.* Cragg (1859), 24 Tex., 582.

In the case last above cited (Thompson *vs.* Cragg) one Prior A. Holder acquired property during marriage held to be community property. The wife died before the husband. The husband then intended to sell entire property. The heirs of mother objected and sued for half the property. (Facts not dissimilar to case at bar.) It was held that the heirs of the mother might recover. This case was decided under the original community laws without reference to

statute, the property having been acquired in 1832, and an attempted sale by husband was made in 1837. In this case it was undertaken to invoke as an authority, against court's ruling and against rights of heirs, the case of Panaud *vs.* Jones, 1 Cal., 488, but the court showed, in a most conclusive manner, the fallacy of the reasoning in the last-named case.

Parker *vs.* Chance (1854), 11 Tex., 513.
Cheek *vs.* Bellows (1856), 17 Tex., 613.
Fullerton *vs.* Doyle (1856), 18 Tex., 4.
Babb *vs.* Carroll (1858), 21 Tex., 765.
Forbes *vs.* Moore (1869), 32 Tex., 196.
Johnson *vs.* Harrison (1877), 48 Tex., 257.
Verimendi *vs.* Harrison (1878), 48 Tex., 531.

The latter is a case similar to Crary *vs.* Field, 9 N. M., 222.

Zimpleman *vs.* Robb (1880), 53 Tex., 274.
Caruth *vs.* Grigsby (1882), 57 Tex., 265.
Slater *vs.* Neal (1885), 64 Tex., 222.
Edwards *vs.* Brown (1887), 68 Tex., 329.
Patty *vs.* Middleton (1891), 82 Tex., 586.

12. THE WIFE MAY BY WILL DISPOSE OF HER SHARE OF COMMUNITY PROPERTY.

Sec. 2030, New Mexico Compiled Laws (1897).
Pedro Murillo Velarde's Practica de Testamentos.
Schmidt's Civil Law, art. 969.
Upton and Jennings' Civil Law of La., art. 133.

Hall's Mexican Law, secs. 2707, 2669, 2671, 2677.

Walton's Civil Law of Spain and Spanish America, arts. 1392 *et seq.;* arts. 1401, 1426, 1433, 1412 *et seq.*, 1435, 1436, 1441.

13. NOT MERELY BY WAY OF ANALOGY, BUT IN FACT THE COMMUNITY IS A SPECIES OF PARTNERSHIP.

Walton's Civ. Law of Sp. and Sp. America (*supra*), art. 1395.

Also Schmidt's Civil Law of Spain and Mexico, arts. 43, 58, 728, 729.

Also White's New Recopilacion, page 60.

Also Johnston's Civil Law of Spain, pages 67, 69.

Also Upton and Jennings' Civ. Law of La., art. 2312.

Also Spanish and Mexican authorities (*infra*).

Ballinger on Community Property, secs. 5, 6, 8, 9, 15, 16, 17, 18, 19, 32, 33, 34, 36, 38, 74, 76, 77, 78, 79, 81, 82, 83, 88.

Schmidt's Civil Law of Spain and Mexico, arts. 40 *et seq.*, 43, 44, 49, 51 *et seq.*, 56, 59, 64, 65, 67, 68.

14. COMMUNITY MAY BE DISSOLVED BY CONFISCATION OF SHARE OF EITHER SPOUSE, BUT THE OTHER SPOUSE IS NOT THEREBY INTERFERED WITH IN THE RIGHTS TO HIS OR HER SHARE.

Schmidt's Civ. Law of Sp. and Mex. (*supra*), arts. 56, 59.

Also White's New Recop. (*supra*), page 63.

Also Sp. and Mex. authorities (*infra*).

15. THE HEIRS OF DECEASED SPOUSE AND SURVIVING SPOUSE MAY FORM A NEW COMMUNITY.

Schmidt's Civ. Law of Sp. and Mex. (*supra*), art. 58.

Also Sp. and Mex. authorities (*infra*).

16. THE WIFE MAY RENOUNCE HER COMMUNITY RIGHTS.

Schmidt's Civ. Law of Sp. and Mex. (*supra*), arts. 43, 64, 65.

Also Sp. and Mex. authorities (*infra*).

17. UPON THE DEATH OF HUSBAND, WIFE ENTITLED TO HALF OF COMMUNITY PROPERTY NOT AS HEIR NOR THROUGH ARBITRARY DIVESTING FROM HUSBAND, BUT BY VIRTUE OF HER COMMUNITY RIGHT.

Kircher *vs.* Murray (1893), 54 Fed., 617 (Texas).

Also Pedro Murillo Velarde, as quoted in 9 N. M., 205.

Also Sp. and Mex. authorities (*infra*).

18. IF NO ISSUE, UPON DEATH OF ONE SPOUSE THE OTHER DOES NOT INHERIT, BUT SHARE OF DECEASED IN COMMUNITY PROPERTY ESCHEATS.

Kircher *vs.* Murray (*supra*).

Babb *vs.* Carroll, 21 Tex., 765, citing Spanish authorities.

19. THE WIFE LOSES HER GAINS IN COMMUNITY PROPERTY IF SHE COMMITS ADULTERY.

Schmidt's Civ. Law of Sp. and Mex. (*supra*), art. 68.

Also Sp. and Mex. authorities (*infra*).

20. ABSOLUTE OWNERSHIP MEANS THE RIGHT TO ENJOY AND DISPOSE OF PROPERTY AS ONE PLEASES (BY TESTAMENT OR OTHERWISE).

"The absolute ownership of property confers the right to enjoy and dispose of it as you please." Schmidt's Civ. Law of Sp. and Mex. (*supra*), art. 188.

"On death of wife, husband *acquires* the *absolute ownership* and full administration of *one-half* of the gains, and can freely dispose of *same* as well by contract *inter vivos* as by testament." Schmidt's Civ Law of Sp. and Mex. (*supra*), art. 67.

Upton and Jennings' Civil law of Louisiana, arts. 2312, 2369, 2371, 2373, 2375.

White's New Recopilacion, pages 60, 61, 62 and 63.

Johnston's Civil Law of Spain, pages 67 *et seq.*

"The right to *ganancias* is *founded* on the *partnership* or society which is supposed to exist between the husband and wife, *because* she bringing her fortune (*capitales*) in dote, gift and *paraphernalia,* and he his in the estates and property which he possesses, it is directed that the gains (*gananciales*) which result from the joint of this mass of property or capital, be *equally* divided between both *partners.*" * * * Johnston's Civ. Law of Sp. (*supra*), page 67.

"If husband leaves property to wife by will, it *shall not* be understood as coming out of that part of the *gananciales* which *belong* to her." Johnston's Civil Law of Spain (*supra*), page 70.

Crary *vs.* Field (1897), 9 N. M., 222.

This is a case wherein the wife dies and thereafter the husband sold the community property. Heirs of wife sue. *Held:* sale by husband was proper *in so far as he acted as an administrator* of the community for the purpose of settling community debts; the interest of the heirs *passed* to them (subject to the payment of community debts) and attached *at the moment of* the death of *their* ancestor; this power (as administrator) to sell after death of wife is the *same* in its nature as was possessed during marriage. This case did not uphold the sale *because* the husband was absolute owner, *but as an act of administration.* The case recognizes and is necessarily predicated upon the proposition that heirs of wife are entitled to inherit and that an inheritable interest passes to them. And the court further directly holds that neither *husband* nor wife *own any specific part of the community estate during marriage.*

Gillett *vs.* Warren (1900), 10 N. Mex., 523.

Carpenter *vs.* Lindauer (1904), 12 N. M., 388; s. c., 78 Pac. 57.

Statutes of New Mexico.

The following statutes, having been enacted in 1865, were in force at the time the community property involved in this case was acquired:

"SEC. 2028. The following persons may demand a division of the inheritance:

"First. * * *

"Second. * * *

"Third. The widow of the deceased, although not an heir, in order to recover her acquests during marriage, and other rights to which she may be entitled." Compiled Laws of New Mexico of 1897 (above same as sec. 1408 Compiled Laws of New Mexico (1884).

"SEC. 2030. The estate, after having been inventoried and appraised as required by law, shall be divided and distributed as hereinafter provided to wit:

"First. * * *

"Second. All property, both real and personal, acquired by either husband or wife during the existence of the marriage community, otherwise than as stated in the last preceding paragraph, shall constitute the acquest (same as 'community' Strong *vs.* Eakin, 11 N. M., 107) property, and shall be liable for the common debts.

"Third. * * *

"Fourth. One half of the acquest property which remains after the payment of the common debts of the marriage, shall be set apart to the surviving husband or wife absolutely." Compiled Laws of New Mexico (1897).

"2031. Subject to the rights, charges and deductions hereinbefore provided, and to the payment of the debts of the decedent, the remainder of the acquest property and the separate estate of the decedent, shall constitute the body of the estate for descent and distribution. * * *" Compiled Laws of New Mexico (1897).

"1411. The remainder of the estate after having made the deductions specified in the previous section,

> and which is styled the acquest property, shall be divided into two parts, one of which shall be *added* to the private property of the husband, the total amount of which shall be the body of the estate, and subject to distribution; the other part shall be added to the private property of the wife; * * *" Compiled Laws of New Mexico (1884).

The Kearney Code of Laws, enacted by the first session of the New Mexico legislature (Bray *vs.* U. S., 1 N. M., 1) provides:

> "SEC. 1. The laws heretofore in force concerning descents, distributions, wills and testaments, as contained in the treatise on these subjects, written by Pedro Murillo Velarde, shall remain in force so far as they are in conformity with the Constitution of the United States. * * *"

In Pedro Murillo Velarde's Práctica de Testamentos we find the following: "La muger casada puede hacer testamento sin licincia de su marida * * *" (The married woman may make a testament without permission of her husband); also: "Heredero se llama al que sucede en los *bienes de otro,*" sec. IV. (Heir is called he who succeeds to the *property of another*); also: "Tiene derecho el conyuge que sobrevive, a la mitad de los bienes gananciales habidos durante el matrimonio. Este derecho se funda en la sociedad *ó compania legal* (author's italics) que hay entre los casados como efecto civil del matrimonio," sec. XII. (The surviving conjugal partner has a right to half of the ganancial property acquired during the marriage. This right is based on the society or legal company which exists between them as a civil effect of marriage), citing Recopilacion and Nov. Recopilacion.

B. American authorities, contra, and criticism.

Panaud *vs.* Jones (1851), 1 Cal., 488.
Van Maren *vs.* Johnson (1860), 15 Cal., 308.
Packard *vs.* Arellanes (1861), 17 Cal., 525.
Spreckles *vs.* Spreckles (1897), 116 Cal., 339; s. c., 48 Pac., 228.

These cases are decidedly *influenced* by local statute, if indeed they are not *based* upon statute, as against the original Spanish law of community property.

In holding that the community property may be sold to satisfy the separate as well as the community debts of deceased, they are entirely opposed to and inconsistent with the original law of community property.

Escriche's Elements of Sp. Law., p. 38.
Schmidt's Civil Law, art. 49.
Upton & Jennings' Civ. Law of La., art. 2372.
Johnston's Civ. Law, p. 69.
Porto Rico Code, sec. 1325.
Sp. and Mex. authorities (*infra*).

They oppose the well-known rule of community property law that the heirs inherit directly from their mother and that her interest passes to them immediately upon her death (see Proposition "10," *supra*).

They fall into error in holding that the heirs do not acquire any interest whatever until the death of both spouses, if they intend to follow community law property.

Sp. and Mex. authorities (*infra*).

They err in holding that upon death of wife husband has unlimited control of community property.

Johnston's Civ. Law, p. 70.
Thompson *vs.* Cragg (*ante*).

They are absolutely inconsistent with Beard *vs.* Knox, 5 Cal., 252, and with Smith *vs.* Smith, 12 Cal., 217, and with De Godey *vs.* De Godey, 39 Cal., 157, and with Galland *vs.* Galland, 38 Cal., 265, and with *In re* Buchanan's Estate, 8 Cal., 507.

The fallacy of the reasoning in Panaud *vs.* Jones is conclusively shown in Thompson *vs.* Cragg, 24 Tex., 582.

Following Lawrence *vs.* Guice, 2 La. Ann., 266, they are misled by detached passages of the commentator Febrero.

They hold that the wife in acquiring half of community property upon death of husband and the children of wife in acquiring half of the community property do so *not as heirs*, but by virtue of their unnatural and arbitrary *statute;* thus, in effect, holding that community property, though the absolute property of the husband, yet held by him under conditional limitation. They hold that though the husband upon the happening of an event may be deprived of half of his property, yet the constitutionality of this law cannot be attacked, because the law being in existence when the community property was acquired the husband went into the thing with his eyes open.

They also hold in another place that the wife in coming into her share of the community property upon the death of her husband does so as an *heir of the husband*. This is absolutely against the rule of community property law (see Propositions "17" and "18," *supra.*).

Spreckles *vs.* Spreckles indulges in judicial legislation, arguing along the lines of expediency rather than attempting to search out the law as it is.

The cases of Warburton *vs.* White, 176 U. S., 484, and Martinez y Nadal *vs.* May, 5 Porto Rico Fed. Rep., 582, and Aran y Aran *vs.* Fritze, 3 Porto Rico Fed. Rep., 509, refuse to follow Spreckles *vs.* Spreckles.

Lawrence *vs.* Guice (1847), 2 La. Ann., 226.

See dissenting opinion of Judge Abbott, of the lower court (Transcript of Record, p. 42).

In deciding this case the court bases its opinion upon a detached passage of the author Febrero without any reference to the context. A consideration of this author's context will disclose that the author could not have intended the meaning given by the above court and the California case above that follow this case.

C. Criticism of majority opinion of lower court.

95 Pac., 131; Transcript of Record, p. 28.

The opinion comments on the Texas authorities to the extent merely of reciting the Texas view without attempting to examine the reasoning of those cases, and appears to waive them aside as to their authoritative value by showing that later authorities from that State hold that the wife's (and husband's) interest is not legal, but equitable.

This is a distinction without a difference so far as the merits are concerned. The cases will show that the only value for the distinction has reference to a matter of procedure—to determine the kind or form of action to be brought, etc. (a matter which probably has very little value in New Mexico, where the code system is in operation). The futility of this distinction is shown by McKay on Com. Pro., p. 209.

There is nothing in the authorities to indicate that under Spanish jurisprudence there was ever such a thing as "legal" and "equitable" title, and certainly there was not in Spanish jurisprudence the same historical evolution as that of the Anglo-Saxon law regarding these matters.

The point is that whatever *kind* of interest or title (legal, equitable or what-not) was held by the spouses it was perfectly equal.

The opinion would waive aside the Washington authorities by the hint that they might be influenced by local statute and by *expressions* of certain decisions. Great reliance, however, is placed upon the California cases above criticised and upon Lawrence *vs.* Guice, an examination of which will clearly warrant not only that they may be but that they *are* influenced by local statutes. Especially is this true of the California cases, almost every case depending upon a construction of their statute, the controversies having arisen while the statute was in force. The peculiar constructions placed upon California statutes, if anything, would move one to feel that the Washington statutes were a far more faithful declaration of the principles of the original community law.

The opinion fails to observe that the case Thompson *vs.* Cragg, 24 Tex., 562, arose under a state of facts before there was any statutory action and which called for a solution under the original community property law.

If *expressions* were of sufficient force to thus discredit former decisions it is indeed difficult to find any expression in Sadler *vs.* Niesz, 5 Wash., 630, which could be given the consideration asked for it by this opinion. Wherein there is anything in the case of Hill *vs.* Young, 34 Pac., 144, to make it appear that Holyoke *vs.* Jackson is to be discredited is likewise amazing.

The opinion follows, without any attempt to examine into the reasoning, the case of Lawrence *vs.* Guice (La.), adopting the isolated expression of Febrero mentioned in that case, paying no attention to other passengers of the same author, and giving no consideration to the fact that at best the author is only one of many commentators of the law of Recopilacion de Indias or Novísima Recopilacion, the very written law which should control this case, failing in examining into the original law itself in any original way.

The opinion would invoke as authority for its position the case of Garosi *vs.* Dastas, 204 U. S., 64, but here again, as pointed out in the dissenting opinion of Judge Abbott, it is

difficult to see wherein this case can be invoked for that purpose; rather it is authority against the majority opinion, unless the parts quoted are to control, without paying heed to other parts, and thereby separating from the context.

It is also difficult to see wherein the Missouri cases cited can be considered to materially support the majority opinion. If anything they could as well be cited in favor of appellants herein.

The California cases invoked by the majority opinion have been criticised above.

A thorough examination of the authorities will not warrant the statement that the weight of authority is with the majority opinion, but to the contrary, and based on something more than mere expressions.

D. Spanish and Mexican authorities.

The following is quoted from "Elements of Spanish Law," by Don Joaquin Escriche (1840), translated by Bethel Coopwood (1886):

"TITLE IV.

Of the Effects of Matrimony.

Q. What are the effects matrimony produces?

A. The following: 1. * * * 2. The authority of the husband over the wife with respect to her contracts and management of her property. 3. * * * 4. * * * 5. The community of property. (Laws 47, 54, 55, and 56 of Toro; Law 5, tit. 2, p. 3; Law 1, tit. 8, p. 4; Laws 3 and 4, tit. 17, p. 4, and Laws of tit. 4, lib. 10, N. R.)

Q. What community is this?

A. A certain legal society which is established between the consorts, whereby all the ganancial property is made common to both by halves, although one may have brought more capital than the other. (Laws 1 and 3, tit. 3, lib. 3; Fuero real, or Laws 1 and 3, tit. 4, lib. 10, N. R.)

Q. What are the ganancial properties?

A. All those which the husband and the wife, or either of them, during the matrimony and living together, acquire by purchase or by means of their labor and industry, as also the fruits of the separate property each brought to the matrimony, and of those they acquire *per se* by any lucrative title, as inheritance, legacy, or donation. (Laws 1, 2, 3, 4, and 5, tit. 4, lib. 10, N. R., and Laws 3, 9, and 11, tit. 4, lib. 3, Fuero real.)

Q. How is this society or community of property extinguished?

A. It ceases by the death of one of the consorts, by the confiscation of the property of either of the two, by renouncement of the wife, by legitimate separation, and by adultery of the wife, but in this case only to her injury. (Laws 5, 9, 10, and 11, tit. 4, lib. 10, N. R., and Law 5, tit. 17, p. 7.)

Q. What are the charges of this society?

A. The debts contracted during the matrimony, the donations of the daughters, and the *donations propter nuptias* of the sons. (Law 14, tit. 20, lib. 3, Fuero real; Law 207 of Estillo, and Law 53 of Toro, or Law 4, tit. 3, lib. 10, N. R.)

Q. Who has the dominion in the ganancial property?

A. The dominion in this property is common to both during the society, but only the husband can alienate it while both are living, even without the consent of the wife, provided he does not do it with intent to injure her. (Laws 1, 4, and 5, tit. 4, lib. 10, N. R.; Molina of Primog., lib. 2, chap. 10, and Gutierrez, lib. 2, Prac. Quaest. 121.)"

THE FOLLOWING IS QUOTED FROM "NOVÍSIMA SALA MEXICANA," Vol. I, (1870):

(Text.)

SEC. 2a, *Titulo IV. De los efectos civiles del matrimonio.*

1. El matrimonio produce algunos efectos civiles que vamos á explicar. El primero es el poder que tienen los padres sobre sus hijos, de que hemos hablado en el titulo anterior. El segundo de que se ocupa todo el titulo 9 del libro 5 de la Recopilación, ó sea el 4 del libro 10 de la Novísima, y que no conocio el derecho romano, es la adquisición para ambos conjuges por mitad de lo que cada uno ganaré durante el matrimonio; de modo que todos los bienes que tuvieren el marido y la mujer, son de ambos por mitad, menos aquellos que alguno de los dos probaré que le pertenecen separadamente. (Cting L. 1 tit. 9 lib. 5 de la R. o 4 tit. 4 lib. 10 de la N.) Así es que se presumen comunes, si no se prueba lo contrario, y en éste se funda la necesidad ó conveniencia de otorgar una escritura publica al tiempo de contraer el matrimonio en la que consten los bienes que cada una trae.

2. Ésta es la sociedad ó compañía legal que nace del matrimonio, y durá mientras dura él por beneficio de la ley, que le da algunos diferencias respecto de las Compañías comunes, como

(Translation.)

SEC. 2a. *Title IV. Of the civil effects of the marriage.*

1. The marriage produces some legal effects which we proceed to explain. The first is the authority which the parents have over their children, of which we have treated in the preceding title. The second, which is treated of entirely in title 9 of Book 5 of the Recopilación, or title 4 of book 10 of the Novísima, and *which was unknown to the Roman law,* is the acquisition *by both consorts in halves* of what each of them gained during the marriage; so that all of the properties which the husband and wife may have, *belong to both equally,* excepting those which either of the two may prove belongs to him or her separately. Thus they are presumed to be community, if they are not proved otherwise, and upon this is founded the necessity or convenience of executing a public instrument at the time of contracting marriage in which are set forth the properties which each one brings.

2. This is the society or legal company which is born of the marriage, and lasts while it lasts by benefit of the law, which gives to it some differences as regards the common companies, as we

verémos. Las palabras "estando de consuno" que usa la ley, (citing L. 2 Tit. 9 lib. 5 de R. ó 1 Tit. 4 lib. 10 de la N.), han sirvido de fundamento para asentar que no existe la compañía sino por la cohabitacion de los conjuges, y en apoyo se cita la ley 205 del Estilo que hablando del marido, dice, "estando en uno con su mujer," do modo que cesaría la compañía si los conjuges se separasen uno del otro por largo tiempo. Mas Acevido, Matienzo, Garcia y otros opinan lo contrario, fundados en la frase "durante el matrimonio" de que usa otra ley, explicando las del Fuero y Estilo, pues se ella infieren que los palabras "estando de consuno" no deben entenderse rigorosamente. Mas en el caso que la separación fuese por divorcio, juzgan los mistos autores, que él que dio el motivo liberta al otro de la compania, quedando él sin embargo obligado como sucede en la renuncio maliciosa de la compañía comun.

Á mas se este caso hay otros dos en que se disuelve la compañía legal sin que se disuelva el matrimonio, y son cuando la mujer renuncia la compañía y cuando se confiscan los bienes de alguno de los dos; pues entonces dura solo hasta la sentencia de confiscación, quedando al inocente libre la mitad de los bienes ganandos hasta aquel dia. La ley condena tambien á perder su mitad á beneficio de los herederos del márido a la viuda que viviere deshonestamente.

shall see. The words: "estando de consuño" which the law uses (L. 2. tit. 9. book 5. Recop., or L. 1. tit. 4. book 10, Nov.), have served as basis to allege that the company does not exist except by the cohabitation of the consorts, and in support is cited the law 205 of Estilo which speaking of the husbands, says: "being in one with his wife;" so that the company would cease if the consorts should separate one from the other for a long time. Further, Acevedo, Matienzo, Garcia and others, give the contrary as their opinion, founded on the phrase "during the marriage" which is used by another law (Law 5. tit. and book cited of the Recop. and of the Novisima), explaining those of the Fuero and Estilo, as they infer therefrom that the words "estando de consuno" should not be understood rigorously. Further, in case that the separation should be by divorce, the same authors judge that the one who gave the cause therefore frees the other from the company, leaving him however obligated, as happens in the malicious renouncement of the common company. Besides this case there are two others in which the legal company is dissolved without the marriage being dissolved, and they are, when the wife renounces the company, and when the properties of one of the two are confiscated; as then it continues only until the sentence of confiscation, leaving free to the innocent party

the half of the properties gained up to that day. The law also condemns the widow who lives dishonestly, to the loss of her half for the benefit of the heirs of the husband.

3. Los interpretes del derecho opinan comunmente que si muerto uno de los conjuges, él que la sobrevieve continua viviendo en comunion de bienes con los herederos del otro se entiende continuada la compañía legal, pero Matienzo es de opinion contraría fundado en varios: 1*a.* Que disuelto el matrimonio ceso la razon que trodujo la compañía. 2*a.* Que siendo esta especial y distinta de las comunes es de rigorosa interpretación y no debe ampliarse. 3*a.* Que no proviciendo de la convención ó voluntad de los partes, sino de solo á la ley es arriesgado extenderla presumiendola renevado á pretesta de un tacito consentimiento. Porque parece mas acertado decir, que en el caso no se continua la compañía legal, sino que se contrae otro de nuevo entre el conjuge viudo y los herederos del otro.

3. The interpreters of the law generally opinion that if upon the death of one of the consorts, the survivor continues living in communion of properties with the heirs of the other, the legal company is understood to continue; but Matienzo is of the contrary opinion, founded on various reasons: 1st. That the marriage being dissolved, the reason which introduced the company ceases. 2d. That this company being special and distinct from the common companies, it should be rigorously interpreted and should not be increased. 3d. That not arising from the agreement and will of the parties, but only from the law, it is dangerous to extend it by presuming it to be renewed on the pretext of a tacit consent. Therefore it appears more certain to say, that in this case the legal company does not continue, but that another new one is contracted between the surviving consort and the heirs of the other.

4. No se reputan bienes de la compañía, que comunmente se llaman gananciales, pos que teinen los conjuges antes del matrimonio, los cuales quedan propios de aquel de quien eran.

4. There are not reputed as properties of the company, commonly called *gananciales,* those which the consorts had before the marriage, which remain the property of the one to whom they

Ni las herencias y donaciones que se hicieren a alguno de ellos. Aunque los remuneratorias, si lo son de servicio hecho por los dos, en opinion de Gutierez pertenecen á la compania; segun Garcia en todo caso, y segun Matienzo en ninguno. Tampoco pertenecen los bienes castrenses ó causicastrenses, si no es que sean ganados á costa de ambos (citing L. L. 2 y 5 tit. 4 lib. 10 de la N.) mas todos las demas que cualquiera de los conjuges adquierre por otro titulo con su trabajo é industria, son de la compañía, y se reputan gananciales (citing 1 tit. 4 lib. 10 de la N.) lo mismo que los frutos y rentas de los bienes y oficios de cada uno de ellos, aunque provengan de los de uno solo; de modo que si á este le dejan una herencia sera de el solo; pero los frutas de ella. serán comunes; de donde infieren Gutierez. Acevido y otros, que lo que gana el marido como juez, abogado ó medico, es comun y se reputa por gananciales como frutas civiles de estos eficios, que la ley no distinguío cuando establece que lo sean los de cualquiere oficio. Lo son tambien los frutos pendientes al tiempo de disolverse; pero con la distinción de que en los arboles y vinos es menester que hajan aparacido mas no en los sembrados, en los cuales entran los gastos hechos en su beneficio, conforme a una ley, que está recibido en la practica, segun Matienzo y Gomez. Las mejores ó aumentos de los bienes de

belonged, nor the inheritances and donations which may be made to one of them, although the remuneratory, if they are from service rendered by both, in the opinion of Gutierrez, belong to the company; according to Garcia in every case, and according to Matienzo in none. Neither do the properties *"castrenses or casi castrenses,"* if they are not gained at the expense of both; but all others which either of the consorts acquire by other title with his or her work and industry, belong to the company, and are reputed *gananciales,* the same as the fruits and rents of the properties and offices of each one of them, even though they arise from those of one only; so that if an inheritance is left to one, it shall belong to that one only; but the fruits thereof shall be common; from which Gutierrez, Acevedo and others infer, that what the husband gains as judge, lawyer or doctor, is common and is reputed to be *gananciales,* as civil fruits of these offices which the law did not distinguish when it established that the fruits of any office should be so. So also are the fruits pending at the time of the dissolution; but with the distinction that on the trees and vines it is necessary that they shall have appeared, but not in the plantings, into which enter the expenses made for the benefit thereof, according to a law of the Fuero real, which is received in practice, according to Matienzo and

cualquiera de ellos di han provenido de la industria ó del trabajo, pertenecen á la compañía; mas no si son obra del tiempo, como se al campo del marido se lo hubiese anadado algo por aluvion. Esta doctrina de las mejores en opinion de Febrero se entiende solo en cuanto á lo gastado en hacerlos y no en cuanto al mayor valor de la finca; y no tiene lugar en los bienes mayorazgados, pues todos ceden al moyorazga como veremos. Si uno de los conjuges adquiere algo por derecho de retracto, la cosa sera sola de él; pero el otro tendra derecho á la mitad del precio que costo. Lo mismo debe decirse de la cosa permutada respecto de la cual solo tendrá el otro derecho á la mitad de los guantes vueltas ó ribete si lo hubo. Si se compone alguna cosa con dinero de uno solo la cosa será comun, y el comprador podra sacar su precio delcumulo de gananciales.

Gomez. The improvements and increases of the properties of either of them, if they have originated from the industry or work, pertain to the company; but not if they are the work of time, as if the land of the husband something has been added by alluvion. This doctrine, of the improvements in the opinion of Febrero, is understood only as regards what is spent in making them, and not as regards the greater value of the land; and has no place in the entailed properties, as all go to the entail as we will see. If one of the consorts acquires something by right of retraction, the thing shall belong to that one only; but the other will have right to one-half of the price which it cost. The same should be said of the thing exchanged, regarding which the other will have right only to the half of the renumerations, returns or rebates if there be any. If anything should be bought with the money of one alone, the thing shall be common, and the purchaser may take its price from the mass of *gananciales*.

5. El dominio de los gananciales es comun por mitad al marido y la mujer (citing L. L. 1 y 4 tit. 4 lib. 10 de la N.) sin consideración á si alguno llevo mas bienes que el otro al matrimonio. Matienzo opina que esta comunión de bienes es en cuanto al diminio y la posesión; mas Covarrubias y Acevido dicen que respecto de la mujer debe en-

5. The dominion of the *gananciales is common equally in halves to the husband and wife*, without consideration as to whether one brought more properties than the other into the marriage. Matienzo opines that this communion of properties is as concerns the dominion and the possession; but Covarrubias and Acevedo say that as regards

tenderse de un dominio y posesión habitual y no actual, la cual no le adquiere sino por la disolución del matrimonio, durante el cual es solo del marido; y por eso puede enegenar los bienes de la compañía sin nec sidad del consentemiente de la mujer, y es valida la enejenación á menos que sea hecho con animo de defraudarla ó perjudicaria (citing L. 5 tit. and lib. above). Esta circumstancia que exiji la ley para que sea invalida la enejenación, ha ser servido de fundamento á Gomez, Gutierez, Garcia y casi todos los interpretes, para asentar que son validas las enejenaciónes que el marido hiciere sin ese animo, aunque que sea jugando a viviendo viciosamente, contra el sentir de Ayora que opina lo contrario. Tampien se disputa entre los autores si en la facultad de enagenar se incluye la de dar ó donar, afirmandolo Garcia con unos, y negandolo Matienzo con otros. Molina y Gutierez llevan una sentencia medio que parece la mas acertada y es que el marido puede hacer donaciónes moderados, no excesivas y sin causa.

the wife it should be understood as an habitual dominion and possession, and not actual, which latter she does not acquire except by the dissolution of the marriage, during the existence of which it is only of the husband; and therefore he can convey the properties of the company without necessity of the consent of the wife, and the conveyance is valid, unless it is made with the intention to defraud or injure her. This circumstance which the law requires in order that the conveyance may be invalid, has served for foundation to Gomez, Gutierrez, Garcia, and nearly all the interpreters, to affirm that the transfers which the husband may make without that intention are valid, even though it be by gambling or living viciously, against the belief of Ayora, who opines the contrary. It is also disputed among the authors, if in the power to convey is included that of giving or donating, Gomez affirming with others, and Matienzo with others denying. Molina and Gutierrez take a middle course, which appears to be the most correct, and is that the husband can make moderate donations, not excessive and without cause.

6. Mas esta facultad de hacer enagenaciónes debe entenderse limitada á los que se hagan entre vivos, como advierte Acevedo fundado en las mismas palabras de la ley, pue dice: "que los pueda enagenar el marido dur-

6. But this power to make conveyances should be understood as limited to those which are made *inter vivos*, as Acevedo states, based on the same words of the law, which says: "That the husband can convey them during

ante el matrimonio," "y mas abajo: "y que el contrato de enagenamiento vala." De modo que no puede el marido disponer en su testamiento de las gananciales que pertenecén á su mujer, la que antes bien entra por la muerte del marido, en la libre administración de la mitad que corresponde, sin obligación de reservar cosa alguna en la propiedad, ni en el usafructo para los hijos que tuviere de otro matrimonio que hubiese contraido antes (citing L. 6 tit. 4 lib. 10 de la N.) y en consequencia si el marido le hiciere algun legado lo tendrá sin deducción de su mitad.

7. Hemos dicho que la mujer puede renunciar el derecho que en la compañía y haciendolo no queda obligado á pagar parte alguna de las deudas que el marid hubiere contraido durante el matrimonio. Esta renuncia puede verificarse antes de contraer el matrimonio ó despues de disuelto por la muerte; mas si durante el puede hacerse, son varias las opiniones. La mas comun, que defiende Covarruvias, Gomez, Gutierrez, Matianzo y otros, es que tambien puede hacerse entonces, porque además de que la ley habla generalmente usa las palabras "marido y mujer" que solo se dicen con propiedad durante el matrimonio como advierte Acevedo, Gregorio Lopez y Molina opinan por lo contrario fundados en que están prohibidos las donathe marriage" and further down: "and that the contract of conveyance shall be valid." So therefore the husband cannot convey in his will the *gananciales* which *pertain* to his wife, who rather enters by the death of her husband into the free administration of the *half which belongs to her;* without obligation to reserve anything whatever in the ownership, nor in the usufruct, for the children which she may have from another marriage which she may have contracted before; and consequently if the husband should leave her any legacy, she will have the same without deduction from *her half.*

7. We have stated that the wife can renounce the right which she has in the company, and doing so will not be obliged to pay any part of the debts which the husband may have contracted during the marriage. This renouncement may be made before contracting the marriage or after it is dissolved by the death; but as to whether during the same it can be made, the opinions are various. The most common, which Covarrubias, Gomez, Guiterrez, Matienzo and others defend, is that it can also be done then, because the law besides speaking generally, uses also the words "husband and wife," which are only spoken of with propriety during the marriage, as Acevedo states. Gregorio, Lopez and Molina opine the contrary, founded in that the

ciónes entre marido y mujer; mas los que defienden la afirmativa dicen que esta prohibición no se entiende de aquellas donaciónes por las que el donante no se hace mas pobre, aunque el donatario se haga mas rico, como lo expresa la ley, y que este sucede en el caso, porque no siendo inamisible el dominio que adquiere la mujer, sino revocable, como que depende de la enagación que puede hacer el marido, renunciorlo es mas bien no adquirer que dar. No obstante esta respuesta, los razones en que se apoya la negative son tan fuertes, que puede dicirse que ambos opiniónes son igualmente probables; por lo que ofrecida el case, lo mas prudente sera resolverlo por la negativa, si por el exámen del hecho resultaré que para otorgar la renuncia hubo seducción, amenaza ó algun otro engaño de parte del marido; y por la afirmativa si no hubo nada de esto.

donations are prohibited between husband and wife; but those who defend the affirmative say, that this prohibition is not understood of those donations whereby the donor does not make himself poorer, even though the donee becomes more rich, as the law expresses, and that this happens in this case, because the dominion which the wife acquires not being inamissible, but revocable, as it depends on the conveyance which the husband may make, to renounce the same is rather not to acquire than to give. Notwithstanding this answer, the reasons on which the negative is based are so strong, that it may be said that both opinions are equally probable; so that if the case arises, the most prudent thing would be to resolve in the negative, if upon examination of the facts it results that in order to make the renouncement there was seduction, threats or some other deceit on the part of the husband; and for the affirmative if there was nothing of that sort.

8. * * * * *

8. In every company, to liquidate the gains, there are deducted the charges or debts, and in the legal company the dowry of the daughters, and the donations *propter nupcias* to the sons, are reputed as such and should therefore be taken out of the *gananciales*, whether they are given or promised by both, or by the husband alone. But if the *gananciales* should not reach, it shall

be paid in half from the separate properties of both, if promised by both, or from those of the husband alone, if he alone promised. This doctrine is extended by Acevedo, Matienzo and Covarrubias to the case in which one of the consorts being dead, the other makes the promise, the properties being pro indiviso (undivided), based in that these promises are charges against the company; but Gomez is of the contrary opinion.

9. Los otros efectos civiles del matrimonio son 1. Que ninguna mujer puede sin licencia de su marido renunciar ninguna herencia, ya le venga por testamiento ya por intestado. * * *

9. The other civil effects of the marriage are: I. That no wife can without the license of her husband, renounce any inheritance, whether the same comes to her by will, or by intestate, nor accept the same, except with benefit of inventory. II. That neither can she make any contract, nor withdraw from those entered into, nor release any one from them, nor make quasi contracts and enter into suits either as plaintiff or defendant, and if she enters herself or by attorney, whatever she does shall not be valid. III. That the husband can give license to his wife to contract, and do all that without the same she could not do, and that the same being given to her, all that she may do by virtue thereof is valid. And if the husband does not give it, he may be compelled thereto by the judge upon hearing or legal and necessary cause; and if even being compelled he does not give it, *it shall be given by the judge,*

who may give the same also upon hearing of cause, the husband being absent and his return not soon expected, or there being danger in the delay, and all that is done under the license of the judge shall be valid, the same as if the husband had given it. IV. * * * V. * * *

THE FOLLOWING IS QUOTED FROM ESCRICHE'S "DICCIONARIO RAZONADO DE LEGISLACIÓN Y JURISPRUDENCIA," TOMO 2, PAGES 86 ET SEQ.

(Text.)

Bienes Gananciales.—Los que adquieren por un titulo comun lucrativa ú onerosa el marido y la mujer, durante el matrimonio y mientras viven juntos; ó los que el marido y la mujer, ó cualquiera de éllos, durante el matrimonio y viviendo "en uno," adquieren por compra ó mediante su trabajo ó industría; como tambien los frutos de los bienes propios que cada uno lleva al matrimonio y de los que adquiere para si por algun titulo lucrativo mientras subsiste la sociedad conjugal. * * * No se cuentan entre los bienes gananciales:—los que tenian los conjuges antes de contraer el matrimonio,—Los que adquieren durante el por herencia, donación ó legado, que se hiciera uno de ellos * * * (and others). * * * *

El marido y la mujer tienen el *dominio* de los bienes gananciales (citing L. 1 y 4 tit. 4 lib. 10 Nov. Recop.); con la diferencia de que el marido lo tiene

(Translation.)

Ganancial Properties.—Those which are acquired by a common, lucrative or onerous title, by the husband and the wife during the marriage and while they live together; or those which the husband and the wife, or either of them, during the marriage and living as one (en uno), acquire by purchase or by means of their work and industry; as also the fruits of the private properties which each of them takes into the marriage, and of those which they acquire for themselves by some lucrative title while the conjugal society lasts.

All that the husband and the wife gain, *is common to both.* "All things that the husband and wife gain or purchase, they being together (estando en consuno) says Law 1, Title 5, Book 3 of the Fuero Real, belongs to both in half." "Even though the husband has more than the wife, or the wife more than the

en "habito" y en "acto" como se explican los autores, y la mujer solo en "habito," pasando el "acto" cuando se disuelve el matrimonio. Por eso la mujer no puede dar ni enajenar dichos bienes durante el matrimonio, mas el marido puede, sin el consentamiento de la mujer, hacer entre vivos enagenaciónes y aun donaciónes moderados por justas causas; pero serán nulas las donaciónes excesivas ó caprichosos y las enajenaciónes hachos con animo de defraudar á la mujer, la cual tendrá acción en éstos contra los bienes del marido y contra el posaedor do los cosas enajenados. * * *

Los bienes gananciales *son comunes del marido y de la mujer y pertenecen á cada uno de ellos por mitad,* aunque el marido tenga mas bienes propios que la mujer, ó la mujer mas que el marido, aunque la mujer, ó la mujer mas que el marido, aunque el uno gane despues mas que el otro, y en fin. aunque sea uno solo el que los adquiere comerciando ó trabajando; pues en virtud del matrimoníio se establece entre los dos consortes una sociedad legal, diferente de las otras, por la que se comunican reciprocamente sus adquisiciénes (citing Leyes 1, 2, 3, 4, y 5, tit. 4 lib. 10 Nov. Recop.).

Mas esta comunicación ó comunión de bienes cesa en los casos siguentes:—1.° Cuando se confiscan los bienes á uno de los conjuges; pero ninguno pierde su parte de gananciales, por el husband, whether in land or in movables, says Law 3 d. title and book, the fruits shall be *common to both in half."* Laws 1 and 3, title 4, Book 10, Nov. Recop.

As in some cases doubts may arise as to whether certain properties are of this class or not, it is necessary to have in mind, for better clearness of some points which occur, that the following are reputed to be *gananciales:*

The private properties of the husband or of the wife which are found intermingled in such manner or mixed so that it cannot be known to which of them they belong, and neither of them can prove their right of ownership, Law 4, book 10, Nov. Rec. (2); for which reason upon contracting the marriage it is advisable to execute a public instrument of writing in which appears those which each consort had. (3.)

The fruits of any usufruct which either of the consorts may have, Greg. Lop. gl. 2 of the Law 18, tit. 11, Part. 4, and Gomez in the law 50 de Toro, no. 78.

The fruits of the legacy or bequest which may have been left to one of the consorts, even though on account of suit having been brought as to the validity thereof the delivery is delayed until after the death of the consort. Febr. Nov. lib. 1, tit. 2, cap. 8, No. 11. The price of the patrimonial property which during the marriage is bought

delecto del otro,—(citing L. L. 10 y 11 tit. 4 lib. 10 Nov. Recop.) 2. ó En que el principio de derecho criminal segun el cual, solamente el culpable debe sufrir las responsabilidas inherentes al delito. 3. o * * *

—2. ó Cuando la mujer renuncia los gananciales, en cuyo caso no es responsable al pago de las dendas del matrimonio.

—3. ó Cuando la mujer se queda en su casa, sin ir á cohabitar con el marido, á no ser que haya dado á este la dote segun opinión de algunos autores.

—4. ó Cuando los consortes se separan con legitima despensa, pues entonces cada uno hace suyo privalavamente lo que adquiere despues de la separación; pero si el marido echaré de casa á la mujer sin causa legitima ó latrataré cruelmente de modo que se vea obligado á separarse de el, adquirira esta no obstante su mitad de gananciales durante le separación del mismo modo que antes, segun la opinión comun de los autores.

—5. ó Cuando la mujer comete adulterio, etc. * * *

—6. ó Cuando mere alguno de los consortes, como es clare; pues aunque los bienes comunes de la herencia queden en poder del otro "pro indiviso" nu puede entenderse continuada con los herederos del difunto esta sociedad especial, sino contraido tacitamente otra nueva segun las reglas generales. Es de advertir, por ultimo que la mujer que la mujer que es estado de su vindez vive

or recovered by right of retraction or by virtue of stipulation for reconveyance, as to such part of said price as came out of the common fund, Gomez in law 70 of Toro, No. 28.

The value of the offices of regidor, notary or others which are bought during the marriage; which should be adjudicated in case of partition for the price which they may then have and not what they cost, Gomez in law 29 of Toro, No. 21, and Matienzo en law, 5, tit. 9, lib. 5, gl. 4.

That which the husband acquires by means of military services or "*castrenses,*" and the recompenses which the government gives him by virtue thereof, provided he serves without salary and maintains himself at the expense of the capital of both, law 2, tit. 4, lib. 10, Nov. Rec.

That which the husband gains exercising the offices of judge, attorney or others which are considered as *quasi castrenses,* law 5, tit. 4 lib. 10, Nov. Rec.

The cost of the improvements which are made in the free properties of either of the consorts, laws 5 and 9, tit. 4, lib. 5, Fuero Real.

The returns which the consort may have given who exchanged any of his lands, because by reason of the former there was acquisition.

The following are not counted among the ganancial properties:—Those which the consorts

escandalosamente, pierde los gananciales á beneficio de los herederos de su marido. B."

had before contracting the marriage, law 3, tit. 4, lib. 10, Nov. Rec.

Those which they acquire during the same by inheritance, donation or legacy which is made to one of them; laws 2 and 5, tit. 4, lib. 10, Nov. Rec.

Those purchased with money of any properties sold which is the property of the husband or of the wife; law 11, tit. 4, lib. 3, Fuero Real.

Those exchanged for properties pertaining to one of the two only; d. law 11.

The purchases with dowry and good will money of the wife; law 49, tit. 5, Part. 5.

The right of usufruct, and any other personal right which either of the consorts has in his or her favor; Gomez in law 50 Toro, No. 78.

The patrimonial properties which are bought by right of retraction; Gomez, on law 70 of Toro, No. 28.

Those which either of them may have sold before the marriage with stipulation for reconveyance, and after marriage recovers by reason of such stipulation; Gomez d. No. 28.

The remuneratory donations which are made to one of the consorts by reason of peculiar merits; laws 1 and 5, tit. 4, lib. 10, Nov. Rec.

Whatever the husband acquires by means of military services or castrenses, or what is given to him in recompense thereof by the Government,

when he receives a salary and subsists therefrom; laws 2 and 5, tit. 4, lib. 10, Nov. Rec.

The cost of improvements made in properties of the estate; law 46 of Toro.

The improvements or increases which the properties belonging to each of them receives solely from the benefit of nature or of time, without industry nor work; Covarr., Gomez y Matienzo.

The husband and the wife have the *dominion* of the gananciał properties, laws 1 and 4, tit. 4, lib. 10, Nov. Rec., with the difference that the husband has it in custom (habito) and in act (acto), as the authors explain, and the wife only in custom (habito) the act (acto) passing to her when the marriage is dissolved. For that reason the wife cannot give nor convey said properties during the marriage, but the husband can without the consent of the wife make their *inter vivos* conveyances moderately for just causes; but the excessive or capricious gifts will be nul, and the conveyances made with intent to defraud the wife, who will have action in all these cases against the properties of the husband and against the possessor of the things conveyed; law 5, tit. 4, lib. 10, Nov. Rec.; Molina, De Primog., lib. 2, cap. 10; and Gutierr., lib. 2, Pract., quaest. 121. The following are charges of the *gananciales:* 1st. The debts which are contracted during the marriage by reason

of the *conjugal society,* but not those which each consort had before the marriage, as these should be paid from their own properties; law. 14, tit. 20, lib. 3, of Fuero Real, and Law 207 of Estilo; 2d. The dowerys of the daughters and the gifts *propter nupcias* of the sons, whether promised them by both, or by the husband alone. If the ganancial properties are not sufficient to cover the dowerys or donations promised, the consorts shall pay in halves from their own properties what is lacking, in case that both made the promise; but if only the husband made the promise, he alone should satisfy the deficit which results; Law 53 de Toro, or Law 4, tit. 3, lib. 10. Nov. Rec.

The ganancial properties are in *common* of the husband and the wife, *and belong to each of them in half,* even though the husband has more private properties than the wife, or the wife more than the husband, even though one gains more afterwards than the other, and finally even though one only may acquire them trafficking or working; because by virtue of the marriage there is established between the consorts a *legal company,* different from the others, whereby their acquisitions are reciprocally communicated to them; laws 1, 2, 3, 4 and 5, tit. 4, lib. 10, Nov. Rec.

But this communication or communion of properties ceases

in the following cases:—1st. When the properties of one of the consorts is confiscated; but neither loses his or her part of the *gananciales* for the crime of the other, laws 10 and 11, tit. 4, lib. 10, Nov. Rec. 2d. When the wife renounces the *gananciales,* in which case she is not responsible for the debts of the marriage, law 9, tit. 4, lib. 10, Nov. Rec.; it being understood that she can make this renouncement before contracting the marriage, after contracted, and after it is dissolved. 3d. When the wife remains in her house, without going to cohabit with the husband, unless she has given to him the dowery, according to the opinion of some authors. 4th. When the consorts separate with the legal license, as then each makes his or her own privately whatever they may acquire after the separation; but if the husband expels the wife from the house without legal cause, or treats her cruelly so that she is compelled to separate from him, she will nevertheless acquire her half of the *gananciales* during the separation, in the same manner as before, according to the common opinion of the authors. 5th. When the wife commits adultery, as for this crime she forfeits the *gananciales* in favor of the husband, Law 5, tit. 17, Part 7. When either of the consorts dies, as is clear because although the common properties

of the inheritance remain in possession of the other pro indiviso, it cannot be understood as continued with the heirs of the deceased in this special partnership, but rather that a new one is tacitly contracted according to the general rules. It should be noted lastly, that the wife who in her state of widowhood lives scandalously, loses the *gananciales* in benefit of the heirs of her husband. Law 5, tit. 4, lib. 10, Nov. Rec.

The ganancial properties are *made common from the time that the marriage is contracted until it is dissolved,* and consequently there should be counted as among them not only the natural and civil fruits which are collected or received within that time, but also the natural fruits which have appeared and are found pending. But if the fruits have not yet appeared nor are pending when the marriage is dissolved, being of trees or plants which are not sown, they belong to the owner of the soil on which they are found, and there should only be credited to the other consort the half of the value of the work and the expenses which they may have made for the production, *e. g.,* those of the hoeing, pruning, etc., but if they are of sown lands, they should be divided in half. If the land is plowed and not planted, there will be credited to the surviving consort the half of the expenses which are made

thereon; Law 10, tit. 4, lib. 3, of Fuero Real; and Ant. Gomez in law 55 of Toro n. 71. If the fruits of increase of flocks and of any other productive animals, they will be communicated as industrials between both consorts, even though they are not born, provided they exist in the wombs of the females: and as regards the wool of the flocks of sheep, if it is grown, it will be separated as shearing, and deducting the expenses made in the shearing and the support of the cattle, the net results will be divided between the consorts; Ant. Gomez in law 53 of Toro, No. 71, and the practice.

If the wife should bring in the dowery real properties with fruits already showing, and should die before they are gathered, these fruits shall belong to the husband in case that the properties were delivered to him appraised with a value which caused sale; and they shall only belong to him as regards the half, after deducting the expenses, in case he has received the properties without appraisal. But if the wife had renounced the *gananciales,* said fruits should not then be divided in half, but shall be divided into as many parts as there were months, weeks or days passed since the date of the marriage and the day of the crop gathering, and after deducting the expenses of gathering and others, the husband will receive those

which are due him in the months and days during which the marriage subsisted, whether more or less than the half, and the remainder will belong to the heirs of the wife; Law 26, tit. QQ, Part. 4, and various authors.

If a property of the husband or of the wife is rented, there shall be divided in half between the survivor and the heirs of the deceased the part of the annual rental corresponding to the time that the marriage subsisted, leaving the part after the marriage for the owner of the property or his heirs.

If the fruits pending are from an estate of inheritance (mayorazgo), the division shall be made in the following manner: If being married an estate of inheritance should fall to one of the consorts, with the fruits ready to be gathered, there shall belong exclusively to such one the fruits which fall to his or her in the partition with the heirs of the last deceased possessor; but if they are not in that condition, the other consort shall have half of those assigned to the said heir. If the husband is possessor of an estate of inheritance and dies leaving the fruits pending on the entailed properties, the widow will have one-half of the net returns thereof corresponding to the time that she lived with her husband; and the remainder up to the time of the gathering belongs to the successor of the estate: but if

the wife should be the one deceased, there belong to her heirs the half of such pending fruits and of the expenses made in the work of the properties plowed. The same will be observed concerning the husband, if the estate belonged to the wife. If the Fructiferous properties of the estate were rented, the interests or incomes will be divided pro rata according to the time that the deceased lived.

The wife, upon the death of the husband, acquires the full ownership and the administration of the half of the gains made in the marriage, and may freely dispose of the same, either by contract inter vivos or by will, without the obligation to reserve the same for the children of the marriage, Law 14 Toro; provided that in the testamentary dispositions she does not injure the heirs in their estate. In the same manner can the husband dispose of his half of the ganancial properties, without obligation to reserve the same for said children; d. law 14 of Toro.

THE FOLLOWING IS QUOTED FROM FEBRERO'S LIBRERÍA DE ESCRIBANOS. CINCO JUICIOS 7. LIB. I. CAP. IV. § 7 (PAGES 237 ET SEQ.).

(Text.)

1. Deducidos los bienes, que el marido, y su muger acreditarén haber puesto por fondo, y entrado en su *sociedad conyugal* al tiempo de casarse, y despues de

(Translation.)

1. After deducting the properties which the husband and his wife prove having placed as fund, and entered into the *conjugal society* at the time of mar-

casados (ya sean, ó no enteramente suyos, pues una vez que entrán en el fondo de ella, deben sacarse al tiempo de su disolución antes que todo, aunque sean agenos, si no se entregarón á sus dueños mientras subsistio, para que se los pague el que los llevo, y á este fin aplicarsele,) y las deudas contraidas constante su matrimonio verdadero en la forma, y terminos explicados en el anterior capitulo, es incremento, y utilidad de la misma *sociedad* todo el residuo, y, como ganancial, ó multiplicado se debe comunicar en estos Reynos de Castilla, y *dividir por mitad* entre los dos, si viven juntos, segun lo ordena la ley 2. tit. 9. lib. 5. Recop. que dice: Toda cosa que el marido, y la muger ganarén, ó comprarén estando de consuno, *hayanlo ambos por medio,* y si fuere donadio de Rey, y lo diere á ambos, hayanlo *marido, y muger:* y si lo diere al uno, hayalo solo aquel á quien lo diere. *Lo qual era al contrario por derecho antiguo, pues todos los bienes se presumian pertenecer al marido,* y la muger llevaba solamente los que probaba ser suyos, para evitar la sospecha de que los subiese adquirido de trato ilicito; excepto que tuviese arte, ú oficio con el qual los gañase honestamente, pues en este caso no se la desposeia de los que alegaba pertenecerla, y sobre ello era oida. (1) En quanto á como se ha de dividir entre el superstite, é hijos de ambos conyuges la parte del

riage, and after the marriage (whether entirely theirs or not, as once they have entered into the fund thereof, they must be taken out at the time of its dissolution before all else, even though they belong to others, if they were not delivered to their owners while it existed, so that they may be paid by the one who contributed them, and to this end applied to him) and the debts contracted during their true marriage in the manner and terms explained in the foregoing chapter, all the remainder is increment and profit of the said *society,* and as ganancial, or multiplied, shall be communicated in these Kingdoms of Castilla, and *divided in half* between the two, if they live together, as ordered by law 2, title 9, Book 5, Recop. which says: "All things that the husband, and the wife gain or purchase being together, shall be had by *both in half,* and if they be gift of the King, and they be given to both, they shall be had by *husband and wife:* and if given to one, they shall be had only by the one to whom they are given." Which was to the *contrary under the old law, as all the properties were presumed to belong to the husband, and the wife had only those which she proved to be hers,* to avoid the suspicion that she had acquired them by illicit means; unless she had an art or occupation with which she gained the same honestly, as in this case she was

caudal de estos puesta en fondo vitalicio, y lo que se debe practicar, vease el cap. 2. n. 18. de mi primera parte adiccionada al fin.

not deprived of those which she alleged belonged to her, and she was heard thereon. (1) As regards how should be divided between the survivor and children of both the part of the capital placed in the annuity fund and as to what should be done, see chap. 2. n. 18 of my first part added at the conclusion hereof.

2. La conclusion sentada en el numero precedente, milita, y ha lugar no solo quando marido, y muger cohabitan en un mismo Pueblo, y casa, sino aunque esten en diversos, con tal que subsistan el matrimonio, y su mutuo consentimiento, y union de voluntades, y no haya mediado divorcio, v. g. si el marido esta empleado, y la muger porque el clima es nocivo á su salud, ó por otro justo motivo se queda en su patria, ó si en ella tiene algun trafico, y el marido otro en otra parte: pues en estos, y otros casos semejantes subsisten el matrimonio, y la *sociedad*, y union de sus voluntades, aunque no la de sus cuerpos, y asi todo quanto lucren uno, ú otro, ó ambos, *se debe comunicar, y dividir por mitad:* (2) no obstante decir algunos que para esto es precisa la simultanea cohabitacion; pero se desestima su parecer como destituido de fundamento solido.

2. The conclusion set forth in the foregoing number, holds good and applies not only when the husband and wife cohabit in the same town and house, but even if they are in different places, provided the marriage subsists, and their mutual consent and union of wills, and no divorce has intervened, *e. g.,* if the husband is employed, and the wife, because the climate is hurtful to her health, or for some other just cause remains in her country, or if she has therein some business, and the husband another business elsewhere: in these, and other similar cases, the marriage, and the *society* and the union of wills subsist, although not that of their persons, so that all that one or the other or both gain, *should be communicated and divided in half:* notwithstanding that some say that for this there is necessary the simultaneous cohabitation; but this opinion is rejected as destitute of a solid foundation.

3. Lo mismo procede, ya lo gañen ambos, ó el uno solo constante matrimonio, pues aunque

3. The same applies, whether gained by both, or one only during marriage, because though

él uno nada trabaje, no dexará por eso de participar de las utilidades, porque para este unico efecto mediante la legal concesion *son socios de compañiá universal,* en la qual no se impide la *sociedad,* y participación del lucro, por comerciar, y trabajar el uno, y nada hacer el otro, respecto a que se negocia con el caudal, y a nombre de ambos, aunque suene uno solo, (1) pues para dicho fin *se estiman en el legal concepto por una persona.*

one may not work at all, such one would not therefore be unable to participate in the profits, as for this sole purpose through the legal concession *they are partners in universal partnership,* in which the society is not impeded nor the participation of profits, by reason of one doing business and working, and the other doing nothing, as concerns the doing business with the capital and in the name of both, although only one acts, because for that purpose they are in the legal mind *considered as one person.*

4. Sino consta, ni se acredita que bienes llevo cada uno al matrimonio, ó durante el heredo, ó le donaron parientes, ó extranos por su mera contemplacion, y no por la de la *sociedad conyugal,* ó su importe, todos se conceptuan adquiridos en su intermedio, y deben *dividir* en la forma expresada, segun se prueba de la ley 1. de dicho tit. y lib. cuyo contexto es: "Como quier que el Derecho diga que todas las cosas que han marido, y muger, que todas se presumen ser del marido, basta que la muger muestre que son suyas; pero la costumbre guardada es en contrario, que los bienes que han marido, y muger, *son de ambos por medio,* salvo los que probare cada uno que son suyos apartadamente; y ansi mandamos que se guarde por ley." Pero si alguno de ellos acredita los que heredo ex testamento, ó abintestato, ó le donaron, ó

4. If it does not appear nor be proved what properties each of them brought into the marriage, or were inherited during the same, or were donated by parents or others for their own use and not for that of the *marriage society,* or the value thereof, they are all considered as acquired in that interval, and should be *divided* in the manner stated, as is provided by law of said title and book, the context of which is: "Although the Law says that all the things had by husband and wife, all are presumed to belong to the husband, until the wife evidences that they are hers; but the custom observed is to the contrary, that the properties had by husband and wife *belong to both by halves,* except those that each prove to be theirs separately; and we so order that it be observed by law." But if either of them prove those which he or she in-

legaron en la forma expuesta, ya sean muebles, raices, ó de otra clase sin excepcion, seran suyos privativamente, y se deberan separar, y aplicarsele, porque la adquisición que proviene de la sucesion, no pertenece á la *sociedad,* como esta resuelto en derecho. (2.)

herited by will, or abintestate, or was donated or devised in the manner stated, whether they be movables, real estate, or other kind without exception, they shall be his or hers privately, and should be separated and given to him or her, because the acquisition arising from the succession does not belong to the *society,* as is provided by law.

5. En la Villa de Alburquerque, Cindad de Xerez de los Caballeros, y Pueblos de su Comarca, en que se observa el fuero denominado del Baylio, todos los bienes que marido, y muger llevan a su matrimonio, y heredan, y adquieren despues por qualquier titulo, son comunicables como gananciales entre ambos, aunque el uno nada lleve, no pactandose al tiempo del casamiento lo contrario, ó casar segun el de Leon, cuyo fuero esta mandado observar por Real Cedula de 20. de Diciembre de 1778. * * *

5. In the Villa de Albuquerque, Ciudad de Xerez de los Caballeros, and Pueblos of its Comarca, in which is observed the law named of Baylio, all the properties which the husband and wife take into the marriage, and inherit, and acquire afterwards by any title, are communicable as gananciales between them both, even though one of them contribute nothing, if it is not stipulated at the time of the marriage to the contrary, or they are married according to that of Leon, which law is ordered to be observed by the Royal Cedule of December 20, 1778. * * *

6. Los bienes que como gananciales, ó multiplicados se *deben dividir con igualidad entre marido, y muger,* son no solo los que entrambos comprán durante su matrimonio con el dinero, y caudal comun, (1) sino los que compra el marido por si solo, ó su muger con su licencia tacita, ó expresa, ya sea el dinero comun, ó de qualquiera de los dos, pues de todos modos se les co-

6. The properties which as *gananciales,* or multiplied, *should be divided equally between the husband and wife,* are not only such as are purchased between them during the marriage with the common money and capital, but also those which the husband purchases alone, or the wife purchases with his tacit or express license, whether it be with the common money, or that

municán en la forma expuesta, (2) porque se atiende al tiempo de su adquisicion, y no a la persona, en cuyo nombre sueña la venta, y aparecen comprados.

of either of the two, as they are at all events communicated to them in the manner expressed, because attention is paid to the time of its acquisition, and not to the person in whose name the sale is made and they appear as purchased.

7. * * * * *

7. * * * * *

8. Son *igualmente comunicables entre marido, y muger* la comodidad, y frutos del usufructo de alhaja, ó finca que uno de ellos llevo en propiedad al matrimonio, y durante este se consolido con ella, por haber fallecido el que la usufructuaba, ó por otra causa, ó motivo, (5) pues se conceptua haberla llevado en propiedad, y usufructo.

8. The profits and fruits of usufruct of furniture or land which one of them took into the marriage in property, and which was consolidated therewith during the marriage by reason of the death of the person who had the usufruct thereof, or for some other cause or reason, are also equally *communicated between the husband and wife,* as they will be considered as taken into the marriage in property and usufruct.

9. * * * * *

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10. * * * * *

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11. Son comunicables tambien á los conyuges los frutos de la parte de herencia, ó legado que el testador dexo á alguno de ellos, y se vencierón despues de su muerte, no obstante que sobre validación del legado, ó división de la herencia haya habido pleyto, y tardado por este motivo en hacerse la partición; y entrega; pues sin embargo de que Ayor. part. 3. quoest. 29. afirma que el legatario, ó coheredero los ha de llevar precipuos como la

11. There are communicable also to the consorts the fruits of the part of inheritance, or legacy which the testator left to either of them, and which matured after his death, notwithstanding that there may have been suit relative to the validation of the legacy or division of the inheritance, and the making of partition delayed thereby; and delivery; because though Ayor. part. 3, Quaest. 29. affirms that the legatee, or coheir should

cosa legada, fundandose en que no se llama tener perfectamente la cosa mientras no se posee realmente, y con efecto, y *en que los conyuges no pusieron trabajo en su producción, el qual es el motivo fundamental de la ley para que participen de ellos;* no debe seguirse su dictamen: Lo primero, porque el legatario en el instante que fallece el testador, adquiere dominio en lo legado, como especifico, (1) y desde el dia de su adquisición se le deben los frutos, (2) y especialmente desde la litis contestación, desde la qual se constituye poseedor de mala fé el colitigante. (3) Lo segundo, porque la ley no requiere, ni pide precisa, é indispensablemente que los conyuges pongan su industría, y trabajo material en su producción, pues basta que constante *su sociedad,* y union de voluntades se produzcan, y devenguen; y la prueba de ello es el concederselos hasta de los bienes castrenses, y casi castrenses que no se les comunican, como dire en el capitulo siguiente 5. num. 37. pues si su personal trabajo fuera indispensable, no se comunicarían los réditos, pensiones, y otros, en que nada mas nacen, ni tienen que hacer, que percibirios. Y lo tercero, porque la demora en determinarse el pleyto no dana al conyuge, ni por la sentencia adquiere cosa nueva, sino unicamente declaración del derecho que tenía adquirido, como lo expresa la ley Sicuti autem, ( ) Et siquidem 4. ff. Si servitus

take the same precipuos as a thing devised, founded on that he is not held to have the thing perfectly while it is not possessed in reality and with effect, *and in that the consorts did not put any work into its production, which is the fundamental reason of the law for them to participate;* its decision should not be followed: First, because the legatee upon the instant that the testator dies, acquires dominion over the legacy, as specific, and from the day of his acquisition the fruits are due him, and especially from the legal answer, from which time the colitigant constitutes himself possessor in bad faith. Second, because the law does not require nor ask certainly and indispensably that the consorts place their industry and material work in its production, it sufficing that during the *society* and union of wills, they be produced and originated; and the proof of this is that it is granted to them even of the properties "castrense" and "Quasi castrenses," which are not communicated to them, as I will show in the following chapter § 5, No. 37., as if their personal work were indispensable, there would not be communicated the interests, pensions, and other in which they do nor have to do anything more than to receive them. And third, because the delay in determining the suit does not injure the consort, nor is he given any new thing by the sentence,

vindicetur, ibi: Quia per sententiam non servitus constitui, sed quae est, declarari: es así que declara pertenecerle los frutos desde entonces: luego es lo mismo que si desde este tiempo hubiera empezado á percibirlos; y mas, habiendose seguido el pleyto á costa del caudal de ambos, por lo que se retrotrae á él.

but only the declaration of the law that he had acquired, as is expressed by the law "Sicuti autem, et siquidem 4 ff. Si servitus vindicetur, ibi: Quia per tententiam nos servitus constitui, sed quae est, declarari:" so declaring that the fruits belong to him from that time: then it is the same as if from this time he had commenced to receive them; and further, the suit having been continued at the expense of the capital of both, wherefore it returns to it.

12. * * * * *

12. * * * * *

13. Se comunica *por mitad entre los socios conyugales* el precio del fundo patrimonial, que constante matrimonio retrae el marido por derecho de sangre, como mas inmediato consanguineo, pero no el fundo; (2) por lo que aunque el valor de este se inventarie, y considere (segun se debe) como aumento del caudal de ambos, para saber a quanto ascienden las utilidades de la *sociedad*, no se ha de dividir entre ellos, sino aplicarse integro al marido como dueño en parte de pago de su mitad; y por su muerte á sus herederos, como que le suceden en todas las acciónes activas, y pasivas transmisibles, y le representan y ocupan su lugar: y á la muger se dará otra cosa por la mitad que la toca de su valor; pues á ninguno se debe despojar del dominio de sus bienes conocidos para adjudicarlos al otro, sin que

13. There are *communicated in half between the conjugal partners* the price of the patrimonial property, which during the marriage the husband recovers by right of blood, as nearest relative, but not the property itself; wherefore, even though the value of the latter be inventoried, and considered (as it should be), as increase of the capital of both, in order to know what the profits of the *society* amount to, it should not be divided between them, but applied in full to the husband as owner in part payment of his half; and upon his death to his heirs, as they succeed him in all actions assets, and liabilities transmissible, and represent and take his place: and to the wife will be given something else for the half that pertains to her of its value; as no one should be deprived of the dominion of

preceda su consentimiento, ó que en otros termínos no se le pueda hacer pago de su haber, como dexo advertido al contador en el cap. 2. num. 49.

their known properties to adjudicate them to another, without his consent is first had, or that in other words payment shall not be made from his property, as I have explained to the accountant in chap. 2. No. 49.

14. La estimación, ó valor de los oficios de Regidor, Escribano, Procurador, Alguacil, y otros enagenados de la Corona, que durante el matrimonio compran los conyuges, se les debe comunicar en los propios terminos, porque estos oficias por costumbre de estos Reynos, y tacita permision del Soberano se venden, dan in solutum, y hace execución en ellos, y como transmisibles á los herederos se colacionan, al modo que otros bienes, y se les aplican en las particiónes. (1.)

14. The estimation, or value of the offices of Regidor, Notary, Procurator, Alguacil, and others granted by the Crown, which during the marriage is bought by the consorts, should be communicated to them in the same terms, because these offices by customs of these Kingdoms, and tacit permission of the Sovereign are sold, given "in solutum," and execution is made in them, and as transmissible to the heirs are placed, the same as other properties, and applied to them in the partitions.

15. Pero es de advertir que aunque los conyuges los hayan comprado por poco, si al tiempo de la partición tienen mayor valor, se han de adjudicar por el que entonces se les de, y no por el que costaron, (pues su intrinseco incremento toca á la *sociedad conyugal,* al modo que la tocaria el decremento si lo tuviesen) *y de la mitad debe participar la muger;* (2) por lo que si esta fallece con hijos: se buelve á casar su viudo: muere dexandolos tambien del segundo matrimonio: y existe el oficio al tiempo de su muerte: llevarán los del primero su mitad con su aumento intrinseco como parte de

15. But it is to be noted that though the consorts may have bought them for little, if at the time of partition they have a greater value, they should be adjudicated for the value then given them and not for what they cost, (as their intrinsic increment belongs to the *conjugal society,* in the same manner that its decrease would fall to it should there be any) and the *wife should participate in the half;* wherefore if the wife dies with children, and her widower marries again and dies leaving children also of the second marriage: and the office exists at the time of his death: the children

herencia materna: y partiran con sus medios hermanos la otra mitad como herederos todos de un mismo padre; porque aquella mitad por ser adquirida, y dexada por su madre, es privativa de ellos, y no de sus medios hermanos, ni madrastra, segun expuse en el capitulo 2. num. 49, cerca del fin. Lo qual se practica, y debe practicar no solo con esta clase de bienes, sino indistintamente con otros qualesquiera comprados, ó adquiridos por ambos durante su *sociedad,* porque *como duena* la sigue el aumento, ó menoscabo que en ellos haya, y los de el tiempo; excepto que los interesados se convengan en lo contrario, como siendo mayores de veinte y cinco anos, lo pueden hacer. Lo propio milita con el derecho de Patronato adquirido por el marido constante matrimonio por fundación, dotación, ó construcción de alguna Iglesia, pues tambien *se comunica á entrambos.* (1.)

of the first marriage will take their half with the intrinsic increase as part of the maternal inheritance: and the other half will be divided with their half-brothers, all as heirs of the same father; because the former half having been acquired and left by their mother, it is theirs privately, and not of their half-brothers, nor step-mother, as explained in chapter 2. No. 49 near the end. All of which is practiced, and should be practiced not alone with this class of properties, but also indistinctly with any others whatsoever purchased, or acquired by both during *their society,* because the increase, or diminution which they may have or which time gives them, *follows her as the owner;* unless the interested parties agree otherwise, as they may do if over twenty-five years of age. The same applies with the right of Patronage acquired by the husband during marriage, by foundation, dotation, or construction of any Church; which also is *communicated to both.*

16. Supuesto ser comunicable á los conyuges la estimación, ó valor de los referidos oficios comprados constante matrimonio, se pregunta: "Si habiendo comprado alguno el marido antes de casarse, pero no pagado enteramente su precio? Ó si estando gravado con algun censo, se casa, y despues con el dinero dotal de su muger acaba de pagarlo, ó libera el censo, tendra parte la

16. Taking for granted that the estimation, or value of the said offices purchased during marriage, are communicable, it is asked: "If one has been purchased by the husband before marriage, but its price not entirely paid? Or if being encumbered with some charge, he marries, and afterwards with the dotal money of his wife completed the payment, or discharges

muger en el mismo oficio por la subrrogación de su linero, con que se acabo de pagar, ó redimo el gravamen. Y si el aumento, ó mayor valor que tenga al tiempo de la disolución del matrimonio, sera ganancial, y como tal comunicable?

17. Y se responde á lo primero, que aunque es indubitado que lo que se compra con el dinero dotal, se contempla dotal, y lo comprado se subrroga en el precio por ello dado, (2) segun, y en los terminos que expuse en el num. 6. y en el cap. 3. num. 26. al 28. No obstante, en el presente caso es diverso, porque no se compro durante el matrimonio, y solamente se pago lo que se debia, y por la nuda, y simple solucion no se transfiere el dominio a la muger, por lo que mucho menos se puede hacer por ella la subrrogación, pues para esta han de intervenir simultanea, y copulativamente no solo la solución, sino la compra, como se prueba de los textos citados, y de otros. (3) Á mas de que el marido recibe el dinero dotal que se le prometio, como acreedor á el, y el acreedor despues de percibir su credito, puede darlo en pago á otro suyo, ó disponer de el á su arbitrio como dueño, por que se le transfiere su dominio: y asi dexa de ser dotal, y por consiguiente no ha lugar la subrrogación.

the encumbrance, will the wife have part in the said office by the subrogation of her money, with which he finished paying for, or redeemed the encumbrance? And if the increase, or greater value which it may have at the time of dissolution of the marriage, will be ganancial, and as such communicable?

17. And it is answered to the first, that though it is undoubted that what is purchased with the dotal money is considered as dotal, and what is purchased is subrogated in the price given therefor, according to, and in the terms set forth in No. 6 and in chap. 3, No. 26 to 28. Nevertheless, in the present case it is different, because it was not purchased during the marriage, and payment was made only of what was owing, and for the mere and simple solution the ownership is not transferred to the wife, and therefore much less can the subrogation be made by her, as for this there must intervene simultaneously and copulatively not only the solution, but also the purchase, as is proved in the text cited and in others. Unless the husband received the dotal money which was promised him, as creditor of some, and the creditor after receiving his credit, can give same in payment to another creditor of his, or dispose of the same at his pleasure as owner, because the dominion is transferred to him: and it so

18. Y á lo segundo, que el mayor valor que tenga el oficio, no sera comunicable, antes bien tocara unicamente á su dueno, *porque este val no se adquirio con el trabajo, ni industria de ambos, ni ellos se lo dieron,* sino el tiempo, ó tal vez ya lo tenia quando lo compro, aunque en menor se le hubiese vandido; por lo que se le aplicara por el en que lo llevo, al modo que si valiere menos, lo llevará por el mismo; pues asi como quando el aumento, y mejorá subreviene á la alhaja del *socio* por su naturaleza, ó por el tiempo, ó por otra causa accidental, no se comunica á los demas *socios:* así tampoco se debe comunicar este aumento intrinseco á los conyuges, quando el fundo se hizo de mayor valor por razon intrinseca. (1) Lo mismo procede, y concibo se debe practicar, quando consta que uno de los conyuges llevo á su matrimonio dinero en especie suficiente para comprar algun oficio, ó finca, y el otro ninguno, ni bienes, con cuyo producto vendiendolos, se pudiese comprar, ó aunque los llevase, resulta esistir sin vender, y á poco tiempo, de casados compra el oficio, ó finca v. g. por veinte, expresando ser con aquel dinero, y al de la muerte de el uno se tasa en sesenta; pues aunque parece que este aumento intrinseco debe comunicarse á la *sociedad,* por

ceases to be dotal, and consequently the subrogation is not proper.

18. And to the second, that the greater value which office may have, is not communicable, but belongs rather to the owner only, because this value was not acquired with the work *nor industry of both, nor did they give it,* but rather the time made it, or perhaps it already had it when purchased, though it was sold to him for less; wherefore it will be applied to him for the value which it had when he took it, and so if it be worth less he will take it for the same price; and so also when the increase or improvement attaches to the movables of the *one partner* by its nature, or by time or other accidental cause, it is not communicated to the other partners: so neither should this intrinsic increase be communicated to the consorts, when the principal was made of greater value by intrinsic causes. The same applies, and I conceive should be practised, when it appears that one of the consorts took into the marriage money in specie sufficient to purchase some office, or property, and the other none, nor properties from the sale of the products of which it might be purchased, or even should he take the same in it is found that they exist unsold, and after a short time married he purchases the office, or lot, *e. g.,* for twenty, expressing it to be that money,

haberse comprado el oficio durante ella: lo contrario es lo veridico, y así tocará solamente al dueno del dinero, porque es visto haberse comprado con el, y subrrogado en su lugar: y el otro conyuge como que ni lo tenio para comprario, ni puso trabajo en su incremento, á nada tendrá derecho, ni tampoco participará de su decremento, si por solo el tiempo lo padeciere; excepto que ambos pacten otra cosa.

and upon the death of one it is valued at sixty; because though it appears that this intrinsic increase should be communicated to the *society,* because the purchase of the office was made during the same, the contrary is true, and it will therefore go to the owner of the money only, because it is seen that it was bought by him, and subrogated in his place: and the other consort not having the wherewith to purchase same, nor placed any work in its increment, will have no right to anything, nor will he participate in the decrease, if it should suffer it from time only; unless both stipulate otherwise.

19. Tambien se comunica á los casados la donación remuneratoría que se les hace constante matrimonio por los servicios, y meritos contrahidos en este tiempo, porque no es propiamente mera, y pura donación lucrativa, sino satisfación del trabajo hecho, ó beneficio recibido; (1) por cuya razon vale la que el padre hace á su hijo constituido en su dominio; (2) como igualmente la que mutuamente se hacen marido, y muger, ó uno solo al otro por sus respectivos, y peculiares meritos; y el Prelado Eclesiastico de los bienes de su Iglesia á quien la sirvio, y beneficio; pues aunque no los puede enagenar, pero por remuneración de los meritos, y servicios hechos en su utilidad, los podrá donar: (3) y en caso

19. There is also *communicated to the married* persons the remuneratory gift which is made to them during marriage for the services or merits rendered in this time, because it is not properly a mere and pure lucrative donation, but satisfaction for work done or benefit received; for which reason the gift which the father makes to his son who is under his dominion is valid; as also that which the husband and wife make mutually, or one only to the other, for their respective and peculiar merits; and the Ecclesiastic Prelate of the properties of his Church to him who served and benefited it; because although he can not convey them, he may donate them as remuneration of the merits and services in its profit:

de duda siempre se presume hecha por ellos, y en su satisfación, y compensación. (4.)

20. * * * * *

21. Asimismo se *comunica á entrambos conyuges* lo que el marido adquiere en la guerra, (que se llama peculio castrense) ó el Rey le dona en remuneración de los servicios que le hizo en ella. Lo qual se entiende, quando sirvio sin sueldo, *y se mantuvo á expensas del caudal de los dos, en cuyo los deben dividir por mitad;* pero si gozo sueldo, y con el se mantuvo, y no con los bienes comunes, nada tocará á la muger de la donación que el Rey le hizo, ó cosa que adquirio en la guerra, como se prueba de la ley 2. tit. 3. lib. 3. del Fuero Real, que es la 3. tit. 9. lib. 5. Recop. y dice: "Si el marido alguna cosa ganaré de herencia de padre, ó de madre, ó de otro propinco, ó de donadio de Senor, ó de parientes, ó de amigo, ó en la hueste del Rey, ó de otro que vaya por su Soldada, hayalo todo quanto ganaré por suyo. V si fuere en hueste sin Soldada *á costa de si, é de su muger, quanto ganaré de esta guisa, todo sea del marido, é de la muger: Caasi como la costa es comunal de ambos, lo que asi ganarén, sea comunal de ambos.*" Y en su declaración lo coroborá la ley 5. del mismo titulo, y libro. (1) Previniendo que lo donado por el Rey se entiende en

and in case of doubt it is always presumed made for them and in satisfaction and compensation therefor.

20. * * * * * *

21. So also will there be *communicated to both consorts* whatever the husband acquires in war, (which is called "Peculio castrense") or is given him by the King in remuneration of his services rendered therein. Which is understood, when he served without salary, and maintained himself at the expense of the *capital of both, in which case they should be divided in half;* but if he received a salary, and maintained himself therewith, and not with the common properties, the wife will take nothing in the donation which the King made him, or thing acquired in the war, as is proved by law 2. tit. 3. book 3. of the Fuero Real, which is the law 3. title 9. book 5. Recop. which says: "If the husband should gain anything by inheritance from father or mother, or other relative, or by gift of Lord, or of relations, or of friend, or in the service of the King, or from another who goes as his soldier, all that he gains goes to him as his own. And if it be gained in service without soldier *at his expense and that of his wife, whatever he gains in this manner, all shall belong to the husband and to the wife: because as the expense is common to both, what they thus*

quanto equivalga á los servícios hechos en la guerra á expensas de ambos, pues si excede á estas, *no se comunicará el exceso á la muger;* cuya opinion es la verídica, y segura. (2) Pero lo que fuera de campaña ahorra de su sueldo, ya éste, ó no jubilado, ó retirado del servicio, y lo que con el compre, y lucre, *sera comunicable á entrambos:* lo primero, porque de ello no habla la ley: lo que esta no prohibe, es visto permitirlo; y lo prohibido en una cosa, se entiende permitido en todas las demas. (3) Y lo segundo, porque este sueldo se la da por razon de alimentos, es fruto, ó emolumento del empleo que obtiene (como lo que ganan el Juez, Abogado, Escribano, y otros) y no donación regia de las que habla la ley, que regularmente son permanentes, y transmisibles, ya consistan en utilidad, ó en honor, v. g. la heredad, titulo, senorio, oficio, privilegio, y otras cosas semejantes, las quales tampoco son colacionables, como en él cap. 3. lib. 2. de esta segunda parte diré.

gain shall be common to both." And this declaration is corroborated by law 5 of the same title and book. Prescribing that what is given by the King is understood in so far as it equals the services rendered in the war at the expense of both, as if it exceeds these, *the excess will not be communicated to the wife;* which opinion is correct and certain. But whatever he saves of his salary outside of campaign, whether or not he be pensioned, or retired from the service, and whatever he purchases and gains therewith, *shall be communicated to both:* the first, because of that the law does not speak: and what it does not prohibit, is proper to allow; and what is prohibited in one thing, is understood to be permitted in all others. And second, because his salary is given to him for the purpose of support, it is fruit, or emolument of the employment which he obtains, (the same as it is gained by the Judge, Lawyer, Notary, and others) and not regal gift of such as the law speaks, which ordinarily are permanent, and transmissible, whether they consist in profit, or in honor, *e. g.* the estate, title, lordship, office, privilege, and other similar things, which also are not collatable, as in chap. 3. book 2. of this second part I will explain.

22. Al modo que lo que el marido adquiere en la guerra, es comunicable á la muger en el

22. In the same manner as whatever the husband acquires in the war is communicable to

caso propuesto, lo es tambien lo que gaña con los oficios de Juez, Abogado, Escribano, y otros semejantes, durante el matrimonio; pues estos oficios son *quasi castrenses,* y lo que le producen, son frutos, *los quales de qualquier calidad que sean les corresponden por mitad,* como diré en el cap. 5. de este libro ( ) 5. pero su propiedad, que son las mismos oficios, ó la facultad de exercerios, si el Rey los concede al marido, toca privativamente á este, y asi nada llevará su muger (1).

23. El precio de la finca, que antes de casarse tenia vendida el marido con el pacto de retrovendendo, y despues de casado recupera en virtud de este pacto, *es igualmente comunicable á entrambos conyuges,* mas no la finca; y así en la partición se ha de aplicar esta al marido, porque á ella ningun derecho compete á su muger, y si unicamente á la mitad del precio con que se recupero, como que salio del fundo comun: y en la adjudicacion ha de observar el contador lo que dexo explicado en el n. 12. en quanto á la retraida por derecho de consanguinidad, (2) pues se atiende al princípio, y no al fin, quando este tiene consecuencia necesaria con aquel. (3)

24. Aunque por derecho antiquisimo no lucraba el marido los partos de las siervas dotales

the wife in the case proposed, so also is what he gains with the offices of Judge, Lawyer, Notary, and others similar, during the marriage; as these offices are *quasi castrenses,* and whatever they produce are fruits which, whatever their nature may be, belong to them in halves, as I will show in chap. 5 of this book 5, but their ownership, which are the offices themselves, or the authority to exercise them, if the King grants them to the husband, belong to him privately, and so the wife takes nothing therein.

23. The price of the land or property, which the husband had sold before marriage with stipulation for resale, and after marriage recovers by virtue of such stipulation, is *also communicable to both consorts,* but not the land or property itself; and in the partition the latter should be applied to the husband, because therein the wife has no right, but only to one-half of the price with which it was redeemed, as it came from the common fund: and in the adjudication the accountant should observe what I have explained in n. 12. as regards the recovery by right of consanguinity, as the principal and not the end is looked to, which the latter is a necessary consequence of the former.

24. Although by very ancient law the husband did not profit of the parturition of the dotal

de su muger, ni los de los rebaños, ó animales productivos, á menos que recibiese en si el peligro de su deterioro, ó perdida: (4) ni se dividian con el, antes bien pertenecian á su muger in solidum, ya naciesen constante matrimonio, ó despues del divorcio: (5) no obstante, hoy segun nuestras leyes que estan en uso, los partos de las siervas de qualquiera de los conyuges *son comunicables á entrambos,* (1) porque se comprenden baxo del nombre generico de reditos, y estos ya procedan de los bienes de uno de los dos, ó de los de ambos, se les comunican indistintamente, al modo que los frutos, á los quales se equiparan regularmente; (2) pues son como frutos industriales, y no naturales, (3) porque en ellos, y *en su producción mas obra el cuidado, industria,* y *solicitud,* que la naturaleza, y no basta la virtud de este para ella; (4) y así como si la esclava se muere, se debe resarcir su precio de los gananciales: asi tambien su parto se debe dividir, porque estos de qualquiera suerte que sean adquiridos constante matrimonio, se *comunican regularmente á marido, y muger,* y quien esta al provecho, debe estar al dano, y al contrario; ( ) y lo propio milita con los partos de los animales productivos.

25. * * * * *

29. Á la muger casada se comunica, y transfiere en habito,

slaves of his wife, nor of the flocks, or productive animals, unless he received himself the risk of their deterioration or loss; nor were they divided with him, but pertained rather to his wife in solidum, whether born during the marriage or after divorce: nevertheless, at present according to our laws now in force, the increase of the slaves of either of the consorts are *communicable between both,* because they are comprised under the generic name of incomes, and these whether proceeding from the properties of one of them or both, are communicated to them without distinction, the same as the fruits, to which they are ordinarily compared; they are like industrial fruits, and not natural fruits, because in their production the *care, industry and solicitude* has more to do than nature, the virtue of which is not sufficient therefor; and thus if the slave dies, her price should be reduced from the ganancial: so also her production should be divided, because these by whatever means they are acquired during the marriage, *are communicated ordinarily to husband and wife,* and whoever has the benefit should also suffer the damage, and *vice versa;* and the same applies with the production of the productive animals.

25. * * * * *

29. To the married woman is communicated and transferred

y potencia el dominio, y posesión revocable, y ficta de la mitad de los bienes, que constante matrimonio lucra, y adquiere con su marido: y despues que este fallece, se le transfiere irrevocable, y efectivamente, de suerte que por su fallecimiento se constituye duena absoluta en posesion, y propiedad de la mitad que dexe, (4) al modo que en los socios convencionales lo dispone la ley 47. al fin, tit. 28. Partid. 3. ibi: Otrost decimos, que toda ganancia que qualquier dellos faga, que el Señorio de ella pasa á los otros tambien, como si cada uno dellos la oviense fecha.

in custom and power, the revocable and fictitious dominion and possession of one-half of the properties which during marriage she acquires and gains with her husband: and after the latter dies, it is transferred to her irrevocably and effectively, so that by his death she becomes constituted absolute owner in possession and property of one-half of what he leaves, in the same manner that is provided for the conventional partners by law 47 at the end, title 28, Partid. 3. ibi (viz): "We declare further: that all gains that any of them make, that the ownership thereof passes to the others also, the same as if each of them had made it."

30. Pero el marido no necesita la disolución del matrimonio para constituirse real, y verdadero dueño de todos, pues constante este, tiene en el efecto su dominio irrevocable: y así los puede administrar, trocar, y no siendo castrenses, ni quasi castrenses, vender, y enagenar á su arbitrio, cesante el doloso animo de defraudar á su muger, como se prueba de la ley 5. tit. 9. lib. 5. Recop. que dice: V otrosi, que los bienes que fueren ganados, y mejorados, y multiplicados durante el matrimonio entre el marido, y la muger, que no fueren castrenses, ni casi castrenses, que los pueda enagenar el marido, durante el matrimonio, si quisiere, sin licencia, ni otorgamiento de su muger: y que el contrato de enagenami-

30. But the husband does not need the dissolution of the marriage to constitute himself the real and true owner of all, because during the existence of the marriage he has in fact his irrevocable dominion: and he may therefore administer, exchange (and not being castrenses nor quasi castrenses), sell and convey the same at his pleasure, in the absence of the deceitful intention of defrauding his wife, as is proved by the law 5. title 9. Book 5. Recopilacion, which says: "And further, that the properties which were gained, and improved, and multiplied during the marriage between the husband and the wife, which were not "castrenses nor quasi castrenses," that the husband may alienate the same, during

ento vala, salvo si fuere probado que se hizo cautelosamente por defraudar, ó damnificar á la muger. Por lo que mientras el marido vive, y no se disuelve su matrimonio, ó no hay divorcio, no debe decir la muger que tiene gananciales, ni impedirle el uso licito de los que adquiera á pretexto de que la ley la concede su mitad, porque esta concesión se entiende para los casos expresados, y no en otro, como algunas necias creen.

the marriage, should he desire, without the license or authorization of his wife: and that the contract of alienation shall be valid, unless it be proved that it was made craftily to defraud or injure the wife." Therefore, while the husband lives, and the marriage is not dissolved, or there is no divorce, the wife should not say that she has gananciais, nor impede him in the lawful use of those he acquires, under the pretext that the law grants her her half, because this concession is understood to be for the cases mentioned, and not in others, as some ignorant persons believe.

31. En consecuencia de lo expuesto se duda si la muger disuelto el matrimonio, podrá repetir, y cobrar de los dendores, y terceros poseedores sin cesión del marido, ó de sus herederos la mitad de los gananciales, y debitos que la toca? Y algunos (1) dicen que si la muger esta contenida con el marido en el instrumento, ó contrato, puede; mas no, sino lo está, porque en la sociedad universal, ó de todos los bienes no se transfieren los derechos sin la cesión, segun el Comun (2).

31. In consequence of what has been stated it is doubted: if the wife, the marriage being dissolved, can claim and demand of the debtors, and third possessors without conveyance from the husband, or from his heirs, the half of the ganancials and debts which fall to her? And some say that if the wife is contained with the husband in the instrument, or contract, she may; but not if she is not (so contained) because in the *universal partnership,* or of all the properties, the rights are not transferred without the demand, according to the "Comun."

32. Pero otros (1) dicen indistintamente que no es necesaria la cesión, ya este, ó no contenida la muger en el instrumento, y los bienes sean muebles, raices, de-

32. But others say indiscriminately that the demand is not necessary, whether or not the wife is contained in the instrument, and whether the proper-

rechos incorporeos, deudas, y acciones. Lo primero, porque si se constituye verdadera duena por la parte que la toca, luego que muere su marido, es superfluo que pida lo que tiene, y el Derecho la concede: (2) pues por su mitad la competen todos los interdicios, ó remedios posesorios. (3) Lo segundo, porque quando la ley divide algo entre varios, no es necesaria la mutua cesión de unos á otros, y así el uno sin la del otro puede pedir su parte. (4) Lo tercero, porque al modo que el socio puede hacer por su parte, y denunciar la obra nueva: si la denuncia á nombre de los consocios, dando la competente caucion, (5) podra exigir tambien los debitos sin cesión. Lo quarto, porque la sociedad convencional se diferencia en muchas cosas de la conyugal, como diré en el ( ) 4. de este capitulo. Lo quinto, porque segun el Derecho de las Partidas, (6) que debemos seguir, lo que un socio adquiere en la compañía universal, se comunica á los demas sin cesión, como queda sentado en el num. 28. y siendolo, como lo es, la conyugal en quanto al lucro, se debe comunicar tambien sin ella. Y lo sexto porque en el nombre generico de bienes se incluyen, y comprehenden los derechos, y acciones: y la viuda del mismo modo adquiere dominio irrevocable en los corporeos que se la aplican, que en los incorporeos; y así como la división, y aplicación judicial de los derechos surte el

ties are movables, real estate, incorporeal rights, debts, or actions. First, because if *she is constituted as the true owner of the part which pertains to her, upon the death of her husband, it is superfluous for her to demand what he has,* and the Law grants her: as for her half she is entitled to all the interdicts, or possessory remedies. Second, because when the law divides anything among various persons, the mutual cession from some to others is not necessary, and so one without the cession of the other can demand his part. Third, because in the same manner that the partner can do for his part, and denounce the new work: if he denounces in the name of the copartners, giving the proper notice, he may also demand the debts without cession. Fourth, because the conventional partnership is different in many things from the conjugal; as I will explain in #4 of this chapter. Fifth: because according to the law of the Partidas, which we should follow, that which one partner acquires in the universal company, is communicated to the others without cession, as is set forth in the number 28, and the conjugal being universal, as it is, as regards the profits, it should also be communicated without the cession. And sixth, because in the generic name of (bienes) properties are included and comprised the rights and actions: and the widow in the same manner acquires the irrevo-

efecto de que pueda pedirlos sin cesion: asi tambien la legal, pues vale el argumento de la ley á la sentencia, y de esta á aquella. (7) Por cuyas razones, es indubitable que puede pedirla, sin necesitar la cesión referida, por bastarle su adjudicación, *con cuyo parecer me conformo.*

cable dominion in the corporeals which are applied to her, as in the incorporeals; and just as the division and judicial application of the rights has the effect of her being able to demand them without cession: so also the legal, because the argument of the law is applicable to the judgment, and the latter to the former. For which reason, it is unquestionable that she demand same, without the cession referred to, because the adjudication will suffice her, *with which opinion I concur.*

33. No solo en el matrimonio legitimo, y verdadero se *comunican á los casados los bienes que con su industria, y trabajo superlucran mientras dura,* sino tambien los que durante el putativo adquieren, con tal que tengan buena fé, é ignorancia, y crean que es legitimo, y no de otra suerte; (1) y lo propio milita para con la dote, pues goza de iguales privilegios en este, que en aquel, si concurren dichas circunstancias. (2) Pero la donacion pura, y simple entre ellos no vale, ni se confirma con su muerte en el matrimonio putativo: ni tampoco ha lugar la sucesion reciproca abintestato de uno á otro (3).

33. Not alone in the legal and true marriage are the properties which *they gain with their industry and work while it exists communicated to the married parties,* but also such as they acquire during the putative marriage, provided that they have good faith, and ignorance, and believe that it is legitimate, and not otherwise; and the same applies as regards the dotal, as it enjoys the same privileges in the latter case as in the former, if said circumstances concur. But the pure and simple donation between them is not valid, nor is it confirmed by the death in the putative marriage: neither is the reciprocal succession *ab intestate* from one to the other applicable.

34. * * * * *

34. * * * * *

35. * * * * *

35. * * * * *

36. * * * * *

37. * * * * *

38. No constando que bienes entraron en su matrimonio el marido, y su primera muger, pero si los que quedaron por muerte de ésta, todos se reputan gananciales, como dexo sentado en el n. 4. y asi se deben dividir por mitad entre ambos. Y aunque el marido ningunos haya entrado en el segundo matrimonio, se ha de aplicar á los hijos del primero la mitad de aquellos (hechas de ella las deducciones referidas) por ser perteneciente á su madre: observandose para no perjudicar á la segunda, ni á los suyos en su dote, gananciales, y demas derechos, lo explicado en el enunciado cap. 3. de este libro en el segundo caso.

36. * * * * * *

37. * * * * * *

38. It not appearing what properties were taken into the marriage by the husband and his first wife, but only such as remained by the death of the latter, all are reputed as gananciais, as I have stated in n. 4, and they should therefore be divided in half between both. And even though the husband took nothing into the second marriage, there should be applied to the children of the first one-half of the former (making from them the deductions mentioned) *as belonging to their mother:* observing in order not to injure the second wife, neither hers in her dower, gananciais, and other rights, what is explained in the said chap. 3, of this book in the second case.

THE FOLLOWING IS QUOTED FROM FEBRERO'S LIBRERÍA DE ESCRIBANOS. TESTAMENTOS Y CONTRATOS 1. CAP. I, § XIII, (PAGES 209 ET SEQ.).

(Text.)

De Los Bienes Gananciales.

241. Los bienes que marido, y muger adquieren, y multiplican constante matrimonio mientras viven juntos, se les comunican por mitad en estos Reynos de Castilla, aunque sea donación que el Rey, ú otro les haga, (1) ó si los compran, suene la venta en cabeza de uno, ó de ambos,

(Translation.)

Of the Ganancial Properties.

241. The properties which the husband and wife acquire and multiply during the marriage while they live together, is communicated to them in halves in these Kingdoms of Castilla, even though they be gift of the King, or other person, to them, or if they are purchased, whether the

porque se atiende al tiempo de su adquisición, y no al sugeto en cuyo nombre aparecen comprados, pues para este efecto se gradnan, *y estiman los dos por una persona en la legal censura;* y sino consta, ni se acredita quales son, ó quanto importan los que cada uno llevo, ó durante el le donaron, ó heredo, todos se presumen gananciales (2) Del mismo modo son comunes las duedas que contraen, y de ellos deben pagarse; (3) paro cada conyuge tiene obligacion de satisfacer de los suyos propios, ya sean, ó no gananciales, las que contraxo, y tenía antes de casarse. (4) En la Cindad de Cordova, y su Obispado no adquieren gananciales las mugeres casadas, excepto que al tiempo de casarse pacten lo contrario con su novios, y estos se conformen, como pueden.

sale appears in the name of one or of both, because attention is given to the time of its acquisition and not to the person in whose name they appear as purchased, as for this purpose *they are both considered and regarded as one person in the legal sense;* and if it does not appear, nor be proved what the properties were or what the value thereof is, that each of them took into the marriage, or was given to or inherited by them during the marriage, they are all presumed to be ganancial. In the same manner are common the debts which they contract, and should be paid therefrom; but each party is obliged to satisfy from his or her own properties, whether ganancial or not, the debts which he or she contracted and had before the marriage. In the City of Cordova, and its Bishopric, the married women do not acquire gananciales, unless at the time of marriage they stipulate otherwise with their lovers and the latter agree, as they may.

242. De esta regla general se exceptuan varios casos, en que no se comunican á los casados los bienes que gañan mientras lo estan; el primero, quando la novia subsiste en su casa, sin haber ido á habitar con su marido, pues entonces como no ha puesto trabajo, ni cuidado en su aumento, y conservacion (que es uno de los motivos, porque se concede á las mugeres la mitad) no debe participar de ellos. (1)

242. To this general rule there are excepted various cases, in which the properties which they gain while they are married are not communicated to the married: the first, when the bride remains in her house, without having gone to live with her husband, as then, as she has given no work nor care in its increase and conservation (which is one of the reasons for which the half is granted to the wife) she should

El segundo, quando se divorcian por culpa de uno de ellos, pues el que la tublere, nada llevara. (2.)

243. El tercero, quando cometen delito de lesa Magestad, ú otro por el que segun derecho debea perderlos, ó se pervierten de nuestra santa Religion; pero entonces solo el perpetrador perdera su mitad, y no el inocente: y se reputan por gananciales todos los aumentados, ha ta que por el crimen se declaran por peridos, aunque este sea de tal calidad, que ipso jure incurra en la pena el agresor. (3) Previniendo que si la muger es adultera, ó se vuelve Mora, Judia, u de otra secta, pierde no solo los gananciales, sino su dote, y arras; (4) y lo mismo la sucedera, si contra la contra la voluntad de su marido se va a la casa de hombre sospechoso, (5) porque se presume adultera.

244. El quarto, quando uno de los dos los adquiere por donacion que el Rey, ú otro le hace; ó por succesión ex testamento, y donacion de algun estraño; ó ex testamento, ó ab intestato de sus consanguineos, pues probando ser suyos por alguna de estas causas, no tiene el consorte parte en elios; (1) y la razon es por no ser visto haberios donado, ni dexado a los dos, sino á el solo;

not participate therein. The second: when they are divorced for fault of one of them, in which case the one at fault would take nothing.

243. The third: when they commit crime of lese majesty or other crime for which according to law they should lose their properties, or when they are perverted from our holy Religion; but then only the perpetrator will lose his or her half, and not the innocent party; and all the increases until they are declared forfeited for the crime, are reputed as ganancial, even though the crime be of such a nature that the aggressor incurs the penalty ipso jure. Providing that if the wife is adulteress, or becomes a Moor, Jew, or of other sect, she loses not only the gananciales, but also her dower, and dowery; and the same will happen, if against the will of her husband she goes to the house of a suspicious man, because she will be presumed an adulteress.

244. The fourth: when one of the two acquires them by donation from the King or other person; or by succession ex testamento, and donation of a stranger; or ex testamento, or ab intestate from their consanguinities; as upon proving that they are his or hers for any of these causes, the consort has no part in the same; and the reason is, that they were not donated

á mas de que la adquisicion que se hace por succesion, no pertenece á la *sociedad,* (2) ni por consiguiente es comunicable á los socios. El quinto, quando son castrenses, ó provienen de salario ó estipendio militar. Lo qual se limita, si los adquieren á expensas de ambos, pues entonces al modo que estas son comunes, deben serlo los salarios, porque son sus frutos, y estos de qualquier calidad que sean se comunican igualmente entre los casados, por cuya razon los bienes quasi castrenses no son comunicables: pues el oficio de Juez, Abogado; Escribano, etc., concedido al marido es la propiedad y lo que con qualquiera de ellos gana, fruto, (3) y se les comunica.

nor left to both, but to one only; and further, that the acquisition had by succession, does not belong to the society, nor is it therefore communicable to the parties. The fifth: when they are "castrenses," or derived from military salary or stipend. Which is limited, if acquired at the expense of both, because then in the same manner that these are common, so the salaries should be also, because they are fruits, and these in whatever form they may be are communicated equally between the married parties, for which reason the properties "quasi castrenses" are not communicable: as the office of Judge, Attorney, Notary, etc., granted to the husband is the property and whatever he gains thereby is the fruit, and this latter is communicable.

245. El sexto, quando el marido enagena constante matrimonio algunos de los gananciales, ó todos: los que puede hacer sin consentimiemto, ni licencia de su muger no siendo castrenses ni casi castrenses, (4) y valdrá, porque esta *no tiene uso de su dominio hasta que su marido muere.* Mas si por la enagenación, ó por otro medio se prueba que la hace *con dolo por damnificaria,* se la comunicarán, pues *tiene* accion para *repetir su mitad,* justificando el dolo, y no de otr asuerte; y en este caso consistiendo los enagenados en numero, peso, ó me-

245. The sixth: when the husband conveys during the marriage some or all of the gananciales; which he can do without the consent or license of his wife, if they are not "castrenses" nor "quasi" "castrenses," and the same will be valid, because the wife has not the use of her dominion until her husband dies. But if the conveyance, or by some other means it be proved that he does so with deceit to injure her, they shall be communicated to her, as she has the right to reclaim her half, proving the deceit, and not otherwise; and in this case if the prop-

dida, ó siendo muebles, que no existen, debe el marido de su patrimonio, ó sus herederos reintegraría su parte, y en su defecto deducirsele de la suya, y aplicarla á su muger, porque es visto haber enagenado los suyos, y no los de esta por defecto de potestad; y si el marido es pobre, purde la muger haciendo previa excusión en sus bienes, demandarla al que la poesa, por haber sido enagenada en fraude, y perjuicio, no necesita hacer la excusión para reivindicarla del poseedor. (1) En quanto a si podra, ó donarlos hay variedad en los Autores, y conformandome con lo que afirma Acevedo en la ley 5. tit. 9. lib. 5. vRecop. No. 9. al 18. conciliando las opiniones, digo que si, con tal que la docación sea á consanguineis, ó modica, de modo que en qualquier evento no defraude á la muger en la mitad, ó mas del haber que en ellos la toca, porque el marido es el que regularmente los gaña con afanes, y desvelos, y la muger poco trabajo tiene en conservarlos, y mayormente en estos tiempos, en que y herencias lo que en luxo, y otras superfluidades desfalcan á los maridos; sobre lo qual habia de haber consideración á la mas, ó menos aplicacion que tubiesen, y en defecto de declaracion del marido justificasen, para refreharlas de esta suerte su belaydad, locura, y prodigalidad, y obligarlas por este medio á cumplir con su obligación, lo que harian si la ley, y Autores demasiado

erties conveyed consist in number, weight, or measure, or being movables do not exist, the husband should from his part or that of his heirs reimburse her, and in default thereof deduction be made from his part and applied to hers, because it is seen that he has conveyed his own, and not hers for lack of power; and if the husband is poor, the wife may after making liquidation (excusion) in her properties, demand same from the person possessing them, on account of having been conveyed in fraud and to her prejudice; but if they exist, she does not have to make liquidation (excusion) in order to recover them from the possessor. As regards whether or not he may donate them, there is a difference of opinion among the Authors, and I, agreeing with what Acevedo affirms in law 5, title 9, book 5, Recop. No. 9, to 18, conciliating the opinions, say that he can, provided the donation or gift be to kindred, or moderate, in such manner that in any event he does not defraud the wife to the extent of one-half, or more of the part thereof which falls to her, because the husband is usually the one who gains the same with toils and privations, and the wife has little work in preserving them, and more so in these times when many of them not only should not share them, but rather lose from their dower and inheritances what they defalcate from their husbands in

afectos, y apasionados no las protexiesen tanto.

luxury and other superfluities; as to which consideration should be had to the more or less application which they have, and in default of declaration of the husband, make proof, to curb in that manner their foolishness and prodigality, and oblige them by this means to comply with their obligation, which they would do if the law, and excessively affectionate Authors, did not protect them so much.

246. El septimo, quando la muger vive deshonestamente estando viuda, pues pierde los gananciales, debe restituirlos á los herederos de su marido, aunque sean estranos, (2) y viene á ser lo mismo en el efecto, que si no los hubiera adquirido; pero esta pena de restitucion no se estiende al marido, porque en el no se contempla deshonestidad, por no ser lecho de su muger como esta lo es de él; por lo que, y por otras razones que da el derecho, (3) no puede acusarlo de adultero, como él á ella. El octavo, quando la muger renuncia los gananciales antes, al tiempo, ó despues de haberse casado; pues valdra el pacto, ó renunciación asi de los presentes como de los futuros, pero entonces no debe pagar deudas. (1.)

246. The seventh: when the wife lives dishonestly being a widow she loses the gananciales, should restore them to the heirs of her husband, and it comes to be the same thing in effect as though she had not acquired them; but this penalty of restitution is not extended to the husband, because in him dishonesty is not contemplated, he not being bed of his wife as she is his; wherefore, and for other reasons which the law gives, she cannot accuse him of adultery, as he can her. The eighth: when the wife renounces the gananciales before, at the time, or after the marriage; such agreement or renunciation will be valid both of the present as well as the future, but then she should not pay debts.

247. El nono, quando el marido con Real permiso, ó sin el hace reparos, y mejoras en las fortalezas, y cercas de las Ciudades, Villas, Lugares, casas, y heredamientos de su mayorazgo,

247. The ninth: when the husband with Royal permission, or without the same makes repairs, and improvements in the forts and walls of the Cities, Villages, Places, houses and lands of his

pues la muger, sus hijos, herederos, y succesores no tienen derecho a pedir la mitad de ellas, que como gananciales debia tocarles, ni el de mayorazgo esta obligado á darles cosa alguna, porque se consolidan con su propiedad. (2)

248. Y el decimo, quando alguno de los conyuges lleva solamente en propiedad al matrimonio una, ó mas alhajas fructiferas, de que un tercero tiene el usufruto, y por muerte del usufructuario recae este en él dueño de aquella, porque como trae la causa de preterito, proviene de la misma porque se adquirio la propiedad, y se consolida con esta, no se contempla cosa distinta, y asi no tiene estimacion el usufruto adquirido en estos terminos, ni es comunicable al otro conyuge, y antes bien se gradua, y conceptua para este efecto como si las hubiera llevado en propiedad, y usufruto á su matrimonio; pues quando el fin tiene causa necesaria con el principio, se atiende á éste, y no á aquel; pero los frutos que las alhajas producen, se comunican á los casados, y deben servir para ayuda á superar las cargas matrimoniales. (3)

249. Aunque uno de los casados lleve al matrimonio, ó adquiera durante el mas bienes que el otro de qualquier calidad que sean sin excepción ni distinción

estates, as the wife, her children, heirs and successors have no right to demand the half thereof, which as gananciales should fall to them, nor is the heir of the estate obliged to give them anything by reason of their being consolidated with his property.

248. And tenth: when one of the married parties takes only in property to the marriage one, or more fruitful "alhajas" of which a third person has the usufruct, and by the death of the usufructuary the usufruct falls to the owner of the thing, because as the cause has preterite, it proceeds from the same cause for which the property was acquired, and it becomes consolidated with it, a different thing is contemplated, and so the usufruct acquired in these terms has no estimation, nor is it communicable to the other consort, but rather is considered and held for that effect the same as though it had been taken in property and usufruct into the marriage; as when the end has necessary cause with the principal, the latter is looked to and not the former; but the fruits which the "alhajas" produce, are communicated to the married parties, and should serve as help to overcome the matrimonial charges.

249. Even though one of the consorts take into the marriage, or acquires during the same more properties than the other, of whatever kind they may be,

de castrenses, quasi castrenses, adventicios, ni profeticios, *se comunican por igualdad á entrambos* todos los frutos que producen, (1) porque estos no gozan del privilegio que los bienes referidos; lo qual procede sin embargo de que al tiempo de la disolución del matrimonio no esten cogidos, ni separados del suelo, sino pendientes en el fundo, ó cosa que los produce, si son frutos aparecen, ó se ven nacidos, arboles, viñas, y huertas, y sus pues no viendose, tocan al dueno del fundo, y se consolidan con su propiedad; pero si el fundo es mere rustico, en que se siembra trigo, cebada, ú otra semilla que no ha nacido, ni se ve, entonces se ha de dividir esta, ó su valor entre los conyuges: y si nada sembrado nada se comunicara, y solo tendrá obligación el dueño propietario de satisfacer al conyuge, ó á sus herederos la mitad de los gastos, ó impensas hechas en sus labores aquel año. (2) Y si los frutos son de rebaños, ú otros animales productivos, ya estén nacidos, ó en el vientre de sus madres, se comunican tambien á los conyuges; (3) lo qual se practica en las particiones, en cuyo tratado lib. 1. cap. 5. § 5. lo explicare con mas extensión, por ser propio lugar.

without conception nor distinction of castrenses, "quasi castrenses" adventitious, or profeticios, all the fruits which they produce are communicated equally between them, because these fruits do not enjoy the privilege of the properties referred to; which is proper however if at the time of the dissolution of the marriage they are not gathered, nor separated from them but are attached to the land, or thing which produces them, if they are trees, vines, and orchards, and if the fruits appear, or are seen born, because if not seen they belong to the owner of the land and are consolidated with his property, but if the land is merely farming land on which is planted wheat, oats, or other seed which has not sprouted nor is seen, then the latter (seed) should be divided, or the value thereof, between the couple; and if nothing is planted nothing will be communicated, and the owner will only have the obligation to satisfy to the consort, or to the heirs one-half of the expenses or disbursements made in the fields that year. And if the fruits are of flocks of sheep or other productive animals, whether born or in the womb of their mothers, they are also communicated to the married parties; which is done in the partitions, which I will explain more extensively in book 1 chap. 5, as being the proper place.

250. Si el marido lega alguna cosa á su muger, no se la ha de contar en su parte de gananciales, sino entregarsela de los bienes propios de su marido; (4) y lo mismo debe practicarse, *quando élla le hace algun legado*, porque versa igual razon. Y si ambos casan algun hijo suyo, y le prometen dote, ú donación deben pagarsela por mitad de los gananciales, y no habiendolos, de sus bienes patrimoniales; pero si uno solo se la ofrece, esta obligado á satisfacersela; (5) de lo qual tratare mas latamente en el lib. 1. cap. 4. § 5. de mi segunda parte.

250. If the husband bequeaths anything to his wife, it should not be counted in her part of the gananciais, but delivered to her from the separate properties of her husband; and the same should be done when she makes a bequest to him, for the same reason. And if both give a child of theirs in marriage, and promise such child a dowry or gift, they should pay the same equally from the gananciais, and if there be none, from their patrimonies; but if only one of them offers it to the child, he is obliged to pay it; of which I will treat fully in book 1. Chap. 4. 5 of my second part.

21. If the husband's power to dispose of community property without the wife's consent is to be a test as to his absolute ownership,—

Query: How can this be maintained where there are "castrenses" or "quasi castrenses", the law having in such cases withheld from the husband the right to dispose of them without the wife's consent?

22. With reference to community property, the husband and wife are considered one in law.

23. The law of community property is written law, as promulgated by "Recopilacion" and "Novísima Recopilacion." (Febrero and other authors are merely commentators of this written law.)

THE FOLLOWING IS QUOTED FROM NOVÍSIMA RECOPILACION, VOL. V, BOOK X, TITLE IV (OF THE GANANCIAL PROPERTIES, OR ACQUIRED IN THE MARRIAGE).

(Text.)

Ley 1.

Todo cosa que el marido y muger ganarén ó comprarén estando de consuno, hayanlo ambos por medio; y si fuere donadio de Rey ó de otri, y lo diese á ambos, hayanlo marido y muger; y si lo diere al uno, hayalo solo aquel a quien lo diere.

Ley 2.

Si el marido cosa ganaré de herencia de padre ó de madre ó de otro propinquo, ó de donadio de señor ó de pariente ó de amigo ó en la hueste del Rey, ó de otro que vaya por su soldado, si fuere en hueste sin soldado, á costa de si y de su muger, quanto ganaré desta guiso, todo sea del marido y de la muger, eu asi como la costa es somunal de ambos, lo que así ganarén sea comunal de ambos: esto que dicho es de suso de las ganancias de los maridos, eso mismo sea de las mugeres.

(Translation.)

Law 1.

(Law 1, Tit. 3, Book 3, of Fuero Real.)

Manner of dividing between the husband and wife the properties acquired in the marriage.

Everything that the husband and wife gain or purchase, they being together, shall be had by both in halves; and if they be gift of the King or of another, and they are given to both, they shall be had by husband and wife; and if they are given to one, they shall be had by the one whom they are given.

Law 2.

Law 2, Title 3, Book 3, of Fuero Real.

Properties common to husband and wife, and those pertaining to each of them alone.

If the husband should gain anything by inheritance from father or mother, or from kindred, or by gift of lord, or of relative or friend, or in the service of the King, or of another who goes as his soldier, he shall have all that he gains for his

own; and if it be in service without soldier, at the cost of himself and of the wife, it being the cost is common to both, what they so gain shall be common to both: that is said of the gains of the husband, so shall it be also of those of the wife. (Law 5, tit. 9, Books 5. R.)

Law 3.

Law 3, Tit. book 3, Fuero Real.

The fruits of the properties belonging to the husband or to the wife shall be community.

Even though the husband have more than the wife, or the wife more than the husband, either in lands or movables, the fruits shall be common for both; and the lands or other things from which the fruits come, shall belong to the husband or to the wife as they were before, or their heirs. (Law 4, tit. 9. book 5. R.)

Ley 4.

(As to the presumption that property is community until contrary is proven.)

Law 4.

Law 203 of Estilo and D. Felipe 2., Yr. of 1566.

The properties which are had by husband and wife are presumed to be common, the respective ownership not being proved.

Notwithstanding that the "Derecho" says that all the things which are had by husband and

wife, are all presumed to belong to the husband, until the wife shows that they are hers; nevertheless the custom observed is the contrary, that the properties had by the husband and wife, that they belong to both in half, except those which each of them prove to be his or hers separately; and we so order that it be erved by law. (Law 1. tit. 9. lib. 5. R.

Ley 5.

Declarando las leyes del Fuero y lo centenido en el Libro del Estilo de Corte, y las otras leyes que disponen sobre la manera que se ha de tener en los bienes ganados entre el marido y la muger durante el matrimonio, mando y ordeno que todos y qualesqouier bienes castrenes y oficios del Rey, y donadios de los que fueron ganados y mejorados y habidos durante el matrimonio entre el marido y muger por el uno dellos que sean y finquen da aquel que los hubo ganado, sin que el otro haya parte dellos segun lo quieren las dichas leyes del Fuero; pero que los frutos y rentas dellos, y de todos otros qualesquier oficios, aunque sean de los que el Derecho hubo por casi castrenes, y los otros bienes que fueron ganados ó mejorados durante el matrimonio, y los frutos y rentas de los tales bienes castrenes y oficios de donadios, que ambos los hayan de consuno y otrosí, que los bienes que fueren ganados

Law 5.

D. Enrique 4. in Nieve, Year 1473, Pet. 25.

Community properties and those pertaining to husband or wife, in declaration of the preceding laws of the Fuero and Estilo.

Declaring the laws of the Fuero, and what is contained in the "Libro del Estilo de Corte," and the other laws which provide in regard to the manner in which the properties gained between the husband and the wife during the marriage shall be held, I order and declare, that all and any properties "castrenses," and offices of the King, and gifts of those which were gained, and improved and acquired during the marriage between the husband and the wife by one of them, that they shall belong and vest in the one who gained them, without the other having part therein, as is required by said laws of Fuero; but that the

mejorados y multiplicados durante el matrimonio entre marido y la muger, que fueren castrenes ni casi castrenses, que los puede enagenar el marido durante el marido durante el matrimonio, si quisiere, sin licincia ni otorgamiento de su muger, y que el contrato de enagenamiento vala, salvo si fuere probado que se hizo cautelosamente por defraudar á la muger.

fruits and rents thereof, and of all other occupations whatsoever, even though they be of such as the "Derecho" held to be "casi castrenses," and those other properties which were gained or improved during the marriage, and the fruits and rents of such properties "castrenses" and offices and gifts, that both shall have them jointly. And further: that the properties which were gained, improved and multiplied during the marriage between the husband and the wife, which were not "castrenses," that the husband may convey the same during the marriage, if he wishes, without license nor authorization of his wife, and that the contract of conveyance shall be valid, unless it be proved that it was made deceitfully to defraud or injure the wife. And I further order and command, that if the wife becomes a widow, and being widow, lives luxuriously, that she lose her properties which she acquired by reason of her half of the properties which were gained and improved by her husband and by her, during the marriage between them, and that such properties be returned to the heirs of her deceased husband in whose company they were gained. (ley 5. tit. 9, book 5. R.)

Law 6.

Law 14 of Toro.

Power of the surviving consort, to dispose of the properties multiplied in the marriage, without obligation to reserve them for his children.

We order, that the husband and the wife, the marriage being dissolved, even though they marry the second or third time or more, may freely dispose of the properties multiplied during the first, or second or third marriage, even though there have been children of such marriages, or of any of them, during which marriages the said properties are multiplied, the same as of their other individual properties which have not been of gain, without being obliged to reserve to such children property nor usufruct of such properties. (Law 6. tit. 9. book 5. R.)

Law 7.

Law 15 of Toro.

Cases in which the parents who pass to second marriage should reserve to the children of the first the ownership of the properties of the deceased.

In all cases where the wives, marrying the second time, are obliged to reserve to the children of the first marriage the property of what they acquired from the

first husband, or inherit from the children of the first marriage, in the same cases the man who marries the second or third time, shall be obliged to reserve the ownership thereof to the children of the first marriage; so that what is established in regard to this case for the wives who marry the second time, shall apply also to the husbands who pass to a second or a third marriage. (Law 4. title 1. Book 5. R.)

Law 8.

Law 16 of Toro.

The properties bequeathed by the husband to the wife are not comprised in the half which she should receive of the gananciais.

If the husband bequeaths anything to his wife at the time of his death or will, it shall not be counted in the part which the wife should receive of the properties multiplied during the marriage, but she shall have such half of properties, and such bequest as may be valid in Law. (Law 7. tit. 9. Book 5. R.)

Law 9.

Law 60 of Toro.

The wife, renouncing the *gananciais,* not to pay the debts made by the husband during the marriage.

When the wife renounces the gains, she shall not be obliged to

pay any part whatever of the debts which the husband may have made during the marriage. (Law 9. tit. 9. book 5. R.)

Law 10.

Law 77 of Toro.

Neither of the consorts, for crime of the other, loses the multiplied properties until the sentence is declared.

For the crime which the husband or the wife commits, even though it be of heresy, or of other class whatever, the only one shall not lose for the crime of the other his or her properties, nor the one-half of the gains had during the marriage; and we order, that there be held as ganancial properties all that is multiplied during the marriage, until for such crime the properties of either of them are declared by sentence, even though the crime be of such kind that it imposes the penalty *ipso juro*. (Law 10, tit. 9, Book 5, R.)

Law 11.

Law 78 of Toro.

The married woman may lose for crime the ganancial and other properties which belong to her.

The wife, during the marriage, for crime may lose in part

or all her properties, dotals or of gain, or of whatever other class they may be.

Law 12.

D. Carlos 3. by resolution and consultation of Sept. 15, and Cedule of the Council of Dec. 20, 1778.

Observance of the law of Baylio in regard to subjecting to partition, as ganancials, the properties taken or acquired in the marriage.

I approve the observance of the law called Baylio, granted to the village of Albuquerque by Alfonso Tellez, its founder, son-in-law of Sancho II, King of Portugal, according to which all of the properties which the married take to the marriage, or acquire by any means, be communicated and subjected to partition, as ganancials; and I order, that all the Tribunals of these my Kingdoms be governed thereby for the decision of the suits which may occur regarding partition in the said Village of Albuquerque, city of Xerez de los Caballeros, and other pueblos where it has been observed until now; this being understood to be without prejudice to prescribing in future otherwise, if the need or passing of time should evidence it to be more convenient than what is now observed by reason of said law, if it be represented by the pueblos.

Law 13.

D. Carlos IV. by Resol. and Cons. of April 17, and Provis. of June 16, 1801, for Cordoba, and ciro, of the Council of March 6, 1802.

Derogation of the law of custom, prohibitive of the Cordoba women to participate of the ganancials acquired during the marriage.

We abolish in what may be necessary the supposed law, custom or style which has governed until now in the city of Cordoba, that the married women have no part in the ganancial properties acquired during the marriage. And consequently we desire and order, that the general law of partition of the gains in marriages be extensive to the women of Cordoba of all that Kingdom, according and as it is practiced with those of Castilla and Leon. And in conformity herewith we order the Corrigidor of the said city of Cordobe, and the major Alcaldes, thereof and all others concerned, to observe, keep and comply with the said resolution of our Royal Person, and cause the same to be observed, kept and complied with in all and by all, according and as contained therein; and in order that his Royal resolution be punctually observed in all the Kingdom, that it be communicated to the Chanceries, Audiences, Corragidores and Justices thereof.

24. MODERN STATUTES OF SPANISH-AMERICAN COUNTRIES CONSTRUE THE LAW OF COMMUNITY PROPERTY IN ACCORD WITH THE PROPOSITIONS HERETOFORE ADVANCED.

The following sections are quoted from "Revised Statutes and Codes" of Porto Rico. (1902).

Title III.

Section 1282.—Persons who may be joined in matrimony may, before celebrating it, execute contracts stipulating the conditions for the conjugal partnership with regard to present and future property, without any other limitations than those mentioned in this Code.

In the absence of contracts relating to property it shall be understood that the marriage has been contracted under the system of legal conjugal partnership.

Section 1310.—By virtue of the conjugal partnership, the earnings or profits indiscriminately obtained by either of the spouses during marriage shall belong to the husband and the wife, share and share alike upon the dissolution of the marriage.

Section 1313.—The conjugal partnership shall be governed by the rules of the articles of partnership in all that does not conflict with the express provision of this chapter.

Section 1316.—What constitutes property of conjugal partnership. (recites them).

Section 1322.—All property of marriage presumed to be partnership until it is proven that it belongs to the husband or to the wife exclusively.

Section 1325.—Payment of debts contracted by the husband or wife before marriage shall not be borne by the partnership.

Section 1327.—The husband is the administrator of the conjugal partnership with the exception of what is prescribed in Sec.'s 81 and 82, Chap. VI. Title V. of Book First of the Code.

Section 1328.—But the husband as administrator shall not have power *to give, to sell* and to *bind* for a consideration, the real estate of the conjugal partnership, without the express consent of the wife.

Section 1329.—Husband may dispose by will, of his half of the property of the conjugal partnership only.

Section 1342.—As to method of separation.

The following parts of codes are quoted from "Codigo Civil" (Civil Code) of the State of Chihuahua (Mexico) and from the Civil Code of Mexican Federal District and Territories, the latter as translated by J. P. Taylor (published by American Book and Printing Company, San Francisco). Inasmuch as both codes are exactly the

same on the propositions at hand, sections of the one are quoted in Spanish, and those that correspond in the other are set opposite as translated as aforesaid:

Chihuahua Code.	*Federal District and Territories Code.*
	Chap. IV (of the administration of the properties of an absent married person).
	Art. 648. A declaration of absence does not dissolve the bond of matrimony, but it interrupts the "conjugal association," except as provided in Art. 653. Art. 650. The spouse present shall immediately receive his or her properties and the corresponding proceeds ("gananciales") up to the day on which the declaration of absence becomes executory. Such spouse can freely dispose of both.
Libro III. Titulo Decimo. Capitulo V. (De La Administración de la sociedad legal).	Chap. V. (of the administration of the legal partnership).
Art. 1895. El dominio y posesión de los bienes comunes reside en ambos conjuges mientras subsiste la sociedad.	Art. 2023. The ownership and possession of the common property belong to both conjugal partners while the partnership subsists.
Art. 1896. El marido puede enajenar y obligar á titulo onerose los bienes muebles sin el consentimiento de la mujer.	Art. 2024. The husband can alienate and obligate with an "onerous title" (for valuable consideration) the movable property without the consent of the wife.

Art. 1897. Los bienes raices pertenecientes al fondo social no pueden ser obligados ni enajenados de modo alguno por el marido, sin consentimiento de la mujer.

Art. 2025. Real estate belonging to the social fund cannot be obligated nor alienated in any manner by the husband without the consent of the wife.

Art. 2026. In cases of unfounded opposition the consent of the wife may be supplied by judicial order, she being previously heard.

Art. 1901. Los conjuges no pueden disponer por testamiento sino de su mitad de gananciales.

Art. 2029. The conjugal partners cannot dispose by will of more than their half of the common property ("gananciales").

Art. 1902. Ninguna enajenación que de los bienes gananciales haga el marido en contravencion de la ley ó en fraude de la mujer, perjudicará á ésta ni á sus herederos.

Art. 2030. No alienation which the husband shall make of the "ganancial" property in contravention of the law or in fraud of the wife shall prejudice the latter or her heirs.

Art. 1903. La mujer solo puede administrar lor consentimiento del marido, o en ausencia o por impedimiento de este.

Art. 2031. The wife can only administer by the consent of the husband or in the absence or through an impediment of the latter.

See also Walton's Civil Law of Spain and Spanish America which contains references to corresponding provisions of the laws of the Latin-American countries.

II.

THE POWER OF A HUSBAND TO ALIENATE COMMUNITY PROPERTY IS THAT OF AN ADMINISTRATOR OR TRUSTEE; THEREFORE, HE IS NOT THEREBY POSSESSED OF A VESTED RIGHT IN PROPERTY, AND TO CHANGE OR MODIFY THIS POWER IS NOT DEPRIVING HIM OF ANY VESTED RIGHT.

Holyoke *vs.* Jackson, 3 Wash., 235; s. c., 3 Pac., 841.
Warburton *vs.* White, 176 U. S., 184; s. c., Book 44, Lawyer's Ed., 555.
Dixon *vs.* Dixon's Executors, 23 Amer. Dec., 478 (La.).
Myer on Vested Rights, sections 278, 1083 and cases cited.
Maynard *vs.* Hill, 125 U. S., 190.
Hamilton *vs.* Dudley, 2 Peters, 492.
McGehee on Due Process of Law, pages 35, 37, 123, 40, 140, 141, 142, 144, 145, 148, 150, 151, 155, 160, 161, 186, 201, 203, 204, 206, 207, and cases cited. Also pages 300, 328, 333, and 366.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 98.

THERESA ARNETT, KATIE READE, ROBERT LEA, MARY BUQUOR, AND AARON H. LEA, APPELLANTS,

vs.

D. M. READE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF APPELLEE.

J. H. PAXTON,
Las Cruces, New Mexico,
Attorney for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1910.

No. 98.

ARNETT ET AL., APPELLANTS,

vs.

READE, APPELLEE.

BRIEF OF APPELLEE.

Statement of Facts.

This is a suit to quiet title to land, brought by Reade, appellee herein, plaintiff in the trial court, against one Lea, defendant in the trial court, to quiet his title to a certain tract of land situate in the county of Doña Ana and Territory of New Mexico, whereof the identity and description are undisputed. After judgment rendered for the plaintiff in the trial court and appeal by the defendant to the Supreme Court of the Territory of New Mexico the defendant died and the appellants herein, being her heirs, were substituted in her stead in the Supreme Court of the Territory of New Mexico.

The agreed statement of facts, whereon the suit was submitted in the trial court, is as follows:

One Adolpho Lea and the defendant Lea were married in December, 1851, and were husband and wife continuously until said Adolpho Lea died intestate in Doña Ana County, New Mexico, on the 23d day of April, A. D. 1902, and defendant Lea is now the surviving wife of said Adolpho Lea. Said Adolpho Lea acquired title to a part of the land in dispute on April 6, 1889, and said Adolpho Lea acquired title to the rest of the land in dispute on June 14, 1893. In April 1902, said Adolpho Lea, for a valuable consideration, executed, acknowledged, and delivered to plaintiff Reade his warranty deed for all the said land in dispute.

Upon this agreed statement of facts the suit came regularly on for a hearing, and the trial court rendered judgment for the plaintiff. From this judgment defendant appealed to the Supreme Court of the Territory of New Mexico, which rendered judgment in affirmance of the judgment of the trial court, and from this judgment in affirmance the substituted heirs of the deceased defendant Lea, appellants herein, have appealed to this court.

Points and Authorities.

A marriage involves and is a civil contract in respect to the property rights of the parties, whatever it may be besides this. When Adolpho Lea and defendant Lea were married, in 1851, the husband, Adolpho Lea, acquired by the contract of marriage, under the Spanish-Mexican community property law then in force in New Mexico, an inchoate right to dispose of any property which the matri-

monial community might acquire, and when the land in question in this suit was acquired by the matrimonial community in 1889 and 1893 the right to dispose of this land vested under the same law, still in force, and under the contract of marriage, in Adolpho Lea, the husband, and became that sacred thing in American law which is called a vested right. The husband may have acquired this land with the intention of donating it or its proceeds to some charitable institution, to his child, or to some relative or friend, as was his right under the law and the contract of marriage. If the statute of 1901 (Session Laws of New Mexico, 1901, chap. 62, sec. 6, p. 118) is given a retroactive effect, so as to affect community land acquired before its enactment, then it impairs this right and works a deprivation of property without due process of law, in that it provides that "neither husband nor wife shall convey, mortgage, incumber, or dispose of any real estate or any legal or equitable interest therein acquired during coverture by onerous title, unless both join in the execution thereof."

This is the first statute enacted in New Mexico modifying the Spanish-Mexican community law upon the point in question here.

I.

The Spanish-Mexican law as to community or acquest property became the law of the Territory of New Mexico from the time of the cession by Mexico, and is still in force in so far as the same has not been modified by statute.

Strong *vs.* Eakin, 11 N. M., 113.
Reade *vs.* De Lea, 95 Pac. Rep., 132.

II.

The laws in force where a contract is made and where it is to be performed enter into it and form a part of it as if they were expressly referred to or incorporated in its terms, and this is true of a contract of marriage.

U. S. *ex rel.* Von Hoffman *vs.* Quincy, 71 U. S. (4 How.), 535; 18 L. Ed., 408-409.

McCreary *vs.* Davis, — S. C., —; 28 L. R. A., 658-661.

Gaines *vs.* Gaines, 9 B. Monroe (Ky.), 306-308; 48 Am. Dec., 436:

The wife sued the husband for divorce and alimony. The husband procured a legislative divorce and pleaded it in bar of the wife's suit, which was then left pending. After the husband's death the wife sued for her dower, which was decreed her by the trial court. In sustaining this decree the court say: And if it were conceded that the marriage contract were not a contract wholly removed, like other contracts, from the power of the legislature to dissolve it in any particular case by a special act of divorce, and that the dissolution of a marriage, if required by public good, may be a legislative function, still it cannot be admitted that a power thus deduced, uncertain upon principle as to its existence, and still more uncertain as to the grounds of its legitimate exercise, can override the express and highly conservative prohibitions of the constitution intended for

the protection of private rights of property. (This was in 1848, before the 14th Amendment.)

Conner *vs.* Elliot, 59 U. S., 591; 15 L. Ed., 498:

The rights incident to the community property system are incidents engrafted by the law of the State on the contract of marriage.

Dixon *vs.* Dixon's Executors, 4 La. Ann., 188; 23 Am. Dec., 480-481:

The wife's right to have her lawful portion of such community property as may be found at the dissolution of the marriage grows out of the marriage contract, and no subsequent legislation can rightfully take it away. (Quoting Touillier:) *Du moment où le mariage est contracté, la communauté convenue expressément, où tacitement, acquiert une existence et une forme irrevocable. Les rapports avec les époux sont à jamais déterminés.* It is not the law in force at the time the community was dissolved, but that in vigor at the period it was formed, which regulates the rights of husband and wife to the property acquired during coverture.

In this case the court adverts to a provision found in the code of Louisiana, that if the husband alienates during coverture the acquets and gains *with the intention of injuring the wife* she may *at his decease* bring an action to set aside the alienation, and, admitting that the wife's title does not vest until the community is dissolved, insists that her right to have an equal portion of such property acquired during coverture *as may be found at its dissolution*

exists during coverture. Is not the husband's right of present disposal during coverture more of a property right than this right of the wife?

III.

No State shall pass any law impairing the obligation of contracts.

Fed. Const., art. 1, sec. 10.

IV.

The extent of the impairment of the obligation of a contract is immaterial. Whatever legislation diminishes the efficacy impairs the obligation.

Louisiana *ex rel.* Ranger *vs.* New Orleans, 102 U. S. 206-207; 26 L. Ed., 133.

V.

A vested right means the power to do certain actions or possess certain things according to the laws of the land.

Calder *vs.* Bull, 3 Dall., 394; 1 L. Ed., 652:

In this case, decided before the adoption of the 14th Amendment, the court held that a legislative act was constitutional, by which a court was enabled to rehear a case, and, by due process of law, reverse its former decision, whereas, in the case at bar, the husband's contractual and vested right of disposal is attempted to be taken from him by a mere act of the legislature.

Bailey *vs.* P., W. & B. R. R. Co., 4 Harr. (Del.), 389; 44 Am. Dec., 602:

By legislative charter the defendant railroad company was empowered to build a bridge across a navigable stream, belonging to the State in absolute propriety, and this is described as its vested right in the opinion. A subsequent act of the legislature, subjecting the company to liability for consequential damages to landowners adjacent to the stream, is held unconstitutional, so long as the railroad company acts within the limits prescribed by its original charter.

Chicago City Ry. Co. *vs.* City of Chicago, 142 Fed. Rep., 847-848:

In holding that a city ordinance requiring a street railroad company to accept transfers issued to passengers by other companies, in no way connected with it, and to carry such passengers over its lines without charge, is unconstitutional and void as depriving such company of its property without due process of law; and that it is immaterial that the requirement is reciprocal and that in operation the effect of the ordinance might be to increase business to such an extent that the companies would suffer no loss, the court says: The enjoyment of property is not simply the right to have the property as valuable as it was before, especially if the judgment as to that value would be exercised by somebody else. The right to enjoy property is the right to not simply obtain all the increment it brings with it. * * * Dominion is enjoyment, and dominion is a part of the property right that the 14th Amendment was intended to protect.

Mandelbaum *vs.* McDonnell, 29 Mich., 78; 18 Am. Rep., 83:

A testator had devised lands in fee simple with a restriction upon the power of alienation. The court say, per Christiancy, J.: There never has been a time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law, and a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void.

VI.

Under the Spanish-Mexican community property law, in force in New Mexico when the marriage was celebrated and when the land in question in this suit was acquired, the husband acquired said land by an absolute and vested title, during the subsistence of the community, save only that he could not dispose of said land in fraud of his wife's expectancy; and the wife, during the subsistence of the community, acquired no vested interest or title in or to said land, but only a revocable and fictitious ownership or a mere expectancy.

Escriche, Diccionario Razonado de Legislacion y Jurisprudencia, tom. II, p. 86 (Bienes Gananciales):

The husband and wife have the ownership of the acquest property; with the difference that the husband has it nominally and in fact, and the wife only nominally, the fact becoming effective when the marriage is dissolved.

Febrero, Bk. I, chap. 4, paragraph 1, Nos. 29 and 30, Tapia on Febrero, vol. I, chap. 8, secs. 17 and 20:

The wife is clothed with the revocable and fictitious ownership and possession of half the acquest property; but after the husband dies it is transferred to her effectively and irrevocably, so that by his death she is constituted absolute owner in possession and title of the half of what he leaves, in the manner provided by law for joint ownership. But the husband does not need the dissolution of the marriage in order to be constituted the real and true owner of all the acquest property, for during the marriage he has in fact the irrevocable ownership. Thus he can administer, exchange, sell and alienate it at will, in the absence of a dishonest intention to defraud his wife.

Schmidt's Civil Law of Spain and Mexico, art. 51 (quoted in Ball. Com. Prop., p. 396):

The husband alone administers the property of the conjugal partnership during the existence of the marriage, and can sell and dispose of the same as he thinks proper, provided always he does so without the intention of injuring his wife.

Ballinger on Community Property, secs. 5 and 6:

The Spanish-Mexican community property law became a part of the law of New Mexico, in its entirety and with slight modifications (pages 21 and 31). The husband has the exclusive administration of the community, and may hypothecate or alienate it as he chooses, but he cannot alienate it maliciously (*con malicia*) and in fraudulent diminution (*en fraude*) of the *gananciæ*. According to Palacios, the reason assigned for the husband's power of disposal of the *gananciæ*

acquired during marriage, without the wife's consent, is because the husband has the dominion and possession of it *in actu et habitu* during the marriage, and the wife only *in habitu* until the marriage is dissolved, when she acquires it equally with the husband. Her interest seems to be a *mere expectancy* during coverture (page 29.)

Barnett *vs.* Barnett, 9 N. M., 213-214:

A divorced wife sued the husband for a share of the community property. The court say: The wife, under the Mexican law, was clothed with the revocable and feigned dominion and possession of one-half of the property acquired by her and her husband during the coverture. During this period the husband is the head of the community, and the law invests him with discretionary power in all matters pertaining to its business or property. In fact its business is conducted and its property acquired in his name, and his authority in the administration of its affairs is exclusive and absolute. The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property vests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true the wife is a member of the community, and is entitled to an equal share of the acquests and gains, but not so long as the community exists; her interest is a mere expectancy, like that which an heir possesses in the estate of an ancestor, and possesses none of the attributes of an estate either at law or equity.

Hagerty *vs.* Harwell, 16 Tex., 665-666:

There is no restraint on the power of the husband to alienate a portion of the community property after suit for

divorce begun unless such alienation is made with a fraudulent view of injuring the rights of the wife.

Meyer *vs.* Kinzer, 12 Cal., 247; 73 Am. Dec., 538-539, 542-543:

Under community property law a mortgage and note were given to husband and wife in part payment for community land sold. The husband alone assigned mortgage and note. The court held, per Field, J.: This change in the form of the common property could not affect the control of the husband over it. The signature of the wife would have added nothing to the validity of the transfer.

People *vs.* Swalm, 80 Cal., 46; 13 Am. St. Rep., 97-99:

The wife had in her possession jewelry which was community property. Swalm knowingly took away said jewelry with the consent of the wife. This was larceny from the husband, because the possession of the wife is that of her husband, and the wife's interest in such property is a mere expectancy.

Greiner *vs.* Greiner, 58 Cal., 119-120.

Spreckles *vs.* Spreckles, 116 Cal., 339; 58 Am. St. Rep., 170-177; 36 L. R. A., 499-502.

Guice *vs.* Lawrence, 2 La. Ann., 226:

The husband made an assignment of community lands for the benefit of his creditors, most of the debts having been incurred before the marriage, and then died. Thereupon the wife sued for her half of the land, after payment of the community debts only. The court say: The laws

of Louisiana have never recognized a title in the wife during the marriage to one-half of the acquests and gains. The rule of the Spanish law on that subject is laid down by Febrero with his usual precision. The provisions of our code on the same subject are the embodiment of those of the Spanish law, without any change. The wife's interest is a mere expectancy, like the interest an heir possesses in the property of the ancestor.

Van Maren *vs.* Johnson, 15 Cal., 312:

Holding the community property liable for the wife's ante-nuptial debts, because the husband is at common law liable for such debts, the court say, per Field, J.: The common property is not beyond the reach of the husband's creditors existing at the date of the marriage, and the reason is obvious: The title to that property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor.

Packard *vs.* Arellanes, 17 Cal., 539-540:

In holding that in the absence of a statute one-half of the personal community property is not subject to administration upon the dissolution of the matrimony by the death of the wife, but vests in her heirs, subject with the rest of the community property to the community debts, the court say: The wife has no vested or tangible interest in the community property. The title to such property rests in the husband, and, for all practical purposes, he is regarded by the law as the sole owner. It is true the wife is a member

of the community, and entitled to an equal share of the acquests and gains; but so long as the community exists her interest is a mere expectancy, and possesses none of the attributes of an *estate*, either at law or in equity. * * * and, in view of the legal position of the parties during marriage, we do not see upon what principle the intangible interest of the wife can be regarded as a part of her estate. It would be absurd to attribute to her death the effect of transforming this interest into a legal right and impressing upon it the character of a title in her representatives. The interest secured to her by the statute only vests upon the death of her husband, and whether it is ever to assume a legal shape depends upon the contingency of her being the survivor. Where the marriage is dissolved by her death her descendants succeed to the interest to which she would otherwise be entitled. They do not, however, succeed to such interest as a portion of her estate, but because it is vested in them by the statute.

Garrozi *vs.* Dastas, 204 U. S., 79, 51; L. Ed., 379:

In denying to the wife the right to call the husband to account for expenditures of the community property, made during the subsistence of the matrimony, on the ground that they were unreasonable and extravagant, the court say: The very foundation of the community and its efficacious existence depends on the power of the husband, during the marriage, over the community, and his right in the absence of fraud, or express legislative restriction, to deal with the community and its assets as the owner thereof.

Reade *vs.* De Lea, — N. M., —; 95 Pac. Rep., 131.

NOTE.—It is evident that the wife may sue to avoid the husband's conveyance of community property, as being in fraud of her rights, only after the dissolution of the community, for until then she has no rights in the community property. Greiner *vs.* Greiner, 58 Cal., 119-121; Cummings *vs.* Cummings, — Cal., —; 14 Pac. Rep., 564.

Compare the wife's suit to avoid the husband's prenuptial conveyance of his fee-simple estate in land, as being in fraud of dower; this suit will lie either before or after the death of the husband. Petty *vs.* Petty, 4 B. Monroe (Ky.), 215; 39 Am. Dec., 501-505; Stroup *vs.* Stroup, 149 Ind., 179; 27 L. R. A., 527.

Leaving out of view the legislation of recent years, investigation of the civil community property law tends to vindicate the distinction claimed by Blackstone for the laws of England, that they favor the female sex. 1 Blackstone's Comm., p. 445.

VII.

Under the Spanish-Mexican law the wife is neither a necessary nor a proper party to a suit involving title to community property. Consequently she has no legal or equitable vested interest therein. The title must vest somewhere. Where but in the husband?

Althof *vs.* Conheim, 38 Cal., 230; 99 Am. Dec., 364.
Jergens *vs.* Schiele, 61 Tex., 255.

Bofil *vs.* Fisher, 3 Rich. Eq. (S. C.), 1; 55 Am. Dec., 630-631:

All persons immediately interested, or who may be benefited or injured by a decree, should be made parties to a suit.

Bent *vs.* Maxwell L. G. & Ry. Co., 3 N. M., 244.
Mandelbaum *vs.* McDonell, 29 Mich., 78; 18 Am. Rep., 83.

VIII.

No State shall make or enforce any law which shall deprive any person of property without due process of law.

Fed. Const., Amendment 14.

IX.

The marriage having been contracted under the Spanish-Mexican law, the husband's right to dispose of the community property cannot be taken away or impaired, as to property already acquired, by a statute enacted subsequently to the acquisition of the property and the vesting of the right.

Spreckels *vs.* Spreckels, 116 Cal., 339; 58 Am. St. Rep., 170-177; 36 L. R. A., 499-502:

In 1893 the husband alone, voluntarily and without any consideration and without the consent of the wife, transferred as a gift community property consisting in stocks acquired by the community prior to the amendment of 1891, which provides that the husband cannot make a gift of community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto. The court held the amendment unconstitutional in respect to property theretofore acquired, as depriving the husband of a property right without due process of law.

Moreau *vs.* Detchemendy, 18 Mo., 526-529:

Husband and wife were married under the Spanish law. On July 20 and on September 21, 1821, the husband con-

veyed away community land acquired under the Spanish law, and the wife joined in the deeds, but did not acknowledge them in conformity to the act of June 22, 1821, directing the mode of acknowledgment of conveyances by which the property of married women might be affected. The court held the deeds effectual to convey the land, and that the subsequent introduction of the common law did not abrogate or interfere with the rights which the parties had acquired under the Spanish law, nor would the legislature have possessed the power, in relation to vested rights, if they had intended any such interference.

Maynard *vs.* Hill, 125 U. S., 206; 31 L. Ed., 657:

In sustaining the legislative power of divorce the court say, per Field, J.: If the act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented.

Reade *vs.* De Lea, — N. M., —; 95 Pac. Rep., 131.

O'Connor *vs.* Harris, 81 N. C., 283-285, and cases cited:

Husband and wife were married under the common law. In 1873 the husband assigned choses in action of the wife, acquired before the marriage, the marriage having been celebrated before the constitution of 1868, which created separate estates in *femes coverts*. The court held that the marriage clothed the husband, or any assignee claiming under him, with the right to have the legal and equitable choses in action of the wife; that this right was a substantial and vested interest, fixed and established by law in the husband as an incident to the marriage and attaching to a fund due

and outstanding, with nothing to defeat it except the possible survivorship of the wife; and that this right could not be taken away from the husband and given to the wife, without his consent, by the constitution of 1868.

Westervelt *vs.* Gregg, 12 N. Y., 205; 62 Am. Dec., 160-166:

Under a State constitution declaring that "no person shall be deprived of life, liberty or property without due process of law," the court hold that the husband cannot be deprived of his right to reduce to possession a chose in action of his wife by the operation of a statute enacted after the marriage and acquisition of the chose in action. The court say: A right to reduce a chose in action to possession is one thing, and a right to the property which is the result of the process by which the chose in action has been reduced to possession, is another and a different thing. But they are both equally vested rights.

Sutton *vs.* Askew, 66 N. C., 172; 8 Am. Rep., 500:

Husband married and acquired land under law providing dower in such lands only as the husband should die seized of. Subsequently act of legislature of 1868-69 gave wife dower in all lands of which husband was seized during coverture. The court held that the act did not prevent the husband from selling and conveying the land by his sole deed after the act, because otherwise it would deprive him of a vested right; and that an agreement to pay the wife a certain sum for her right of dower, on such sale, was void for want of consideration.

Cooley Const. Lim. (7th ed.), p. 513:

The husband's tenancy by the curtesy initiate is a vested right, not subject to legislative interference.

Rose *vs.* Rose, 104 Ky., 48; 41 L. R. A., 354-355:

Husband and wife intermarried, the wife owning land, under the statute of 1846, which provides that "marriage shall give to the husband, during the life of the wife, no estate or interest in her real estate, including chattels, real, owned at the time or acquired by her after marriage, except the use thereof with power to rent the real estate for not more than three years at a time and receive the rent." The court held that the husband's right under the foregoing statute was a vested right, of which he could not be deprived by the statute of 1894, providing that the wife's property shall be her separate and exclusive property, free from the debts and control of her husband.

Gladney *vs.* Sydnor, 172 Mo., 318; 72 S. W., 554; 95 Am. St. Rep., 521-528:

Land was owned by the husband, and occupied as a homestead by husband and wife, under laws by which the husband could sell or encumber the homestead, subject to the wife's inchoate right of dower, without the wife's joinder, unless she had filed her claim of homestead. The statute of 1895 provides that "the husband shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever, and every such sale, mortgage or alienation is hereby declared null and void." The husband alone conveyed the land by trust deed in 1897, the

wife presumably having filed no claim of homestead, since no such claim is mentioned in the opinion. *Held:* That the husband had a vested right, in respect to conveying and encumbering his homestead, prior to the act of 1895, and that act cannot impair such right; and that this alteration or change in the statute was not simply a change in the remedy or procedure, but was, in the clearest terms possible, a deprivation of a right which the husband had prior to the enactment of the statute. The court say: As was said by the court in the celebrated case of Calder *vs.* Bull, 3 Dall., 386, "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land." Did not the husband in this cause have the power to do certain acts in respect to the property in dispute, that the present law prohibits him from doing? * * * (And, quoting from Bruce *vs.* Strickland, 81 N. C., 267:) "These decisions rest upon the sanctity of vested rights under the protection of the constitution, among which is embraced the *jus disponendi*, or right of alienation. The principle is too deeply imbedded in the fundamental law of free government to require vindication." * * * We may add that a law which, even if intended simply to change the remedy or procedure, if in fact it impairs vested rights, is just as obnoxious to the constitutional inhibition as if it in the clearest terms violated the constitutional provision.

Huber *vs.* Merkel, 117 Wis., 355; 93 N. W., 354: 98 Am. St. Rep., 941:

The defendant landowner bored an artesian well to the percolating waters underneath his land, thereby destroying

the flow of an artesian well on the plaintiff's adjacent and higher land, who then sued to enjoin him from wasting or unreasonably using the water from his well, basing his cause of action on chapter 354 of the laws of 1901, which provides that "any person who shall needlessly allow or permit any artesian well owned or operated by him to discharge greater quantities of water than is reasonably necessary for the use of such person, so as to materially diminish the flow of water in any other artesian well in the same vicinity, shall be liable for all damages which the owner of any such other well shall sustain." In holding this statute unconstitutional as depriving the landowner without due process of law of his right to divert, appropriate and use percolating waters as he sees fit, the court say: Where private property rights were founded upon and preserved by any part of the common law so in force, they could not be taken away or impaired by mere legislative enactment, but only for public purposes by the exercise of eminent domain, or by the exercise of the police power for the protection of the public.

X.

The Statutory Doctrine of the State of Washington.

Hill's Wash. Stat., Sec. 1402, Ball. Com. Prop., pp. 372-373:

The wife may receive and hold in her own right wages for personal service, and maintain an action therefor in her own name.

Hill's Wash. Stat., Sec. 1403, Ball. Com. Prop., p. 373:

Earnings and accumulations of wife living separate, and of minor children living with her, are her separate property.

Hill's Wash. Stat., Secs. 1399 and 1400, Ball. Com. Prop., pp. 371-372:

Husband has management and control of community property, and like power of disposition of community personal property as of his separate estate, but wife must join in deed of community real estate.

Hill's Wash. Stat., Sec. 1446, Ball. Com. Prop., p. 376:

Husband or wife may execute power of attorney to any person, authorizing sale or disposition of his or her community interest or estate in the community property.

Hill's Wash. Stat., Sec. 1448, Ball. Com. Prop., p. 377:

Husband or wife, having in his or her name the legal title to community real estate, may sell or dispose of the same, by a valid conveyance, to an actual *bona fide* purchaser.

Brotton *vs.* Langert, 1 Wash., 78-82; 23 Pac. Rep., 688:

The court hold that the community property is not liable for the husband's torts, and say: The community property is purely a statutory creation, a distinct and original creation

of the statute, and to the statute alone must we look for its powers, its liabilities and its exemptions. (The community property is, as a rule, acquired chiefly by the husband's exertions. He may then, in Washington, hide this property behind his wife's skirts against claims for torts committed in its very acquisition.)

Littell *vs.* Miller, 3 Wash. St., 280; 28 Pac. Rep., 1035:

The wife is a necessary party to a suit involving community real estate.

Holyoke *vs.* Jackson, 3 Wash., 235; 3 Pac. Rep., 842:

The court holds that the husband's sole deed of community real estate, without the wife's joinder, is void or voidable absolutely; and that the husband's "like absolute power of disposition as of his own separate property," bestowed by the acts of the legislature of 1869 and 1873, was a mere power conferred upon him as member and head of the community in trust for the community, and may be taken away from him by a subsequent statute.

Mabie *vs.* Whittaker, — Wash., —; 39 Pac. Rep., 172:

The point decided is that the husband cannot, after the wife's death, convey community land by his sole deed to the deprivation of the wife's son and heir. No question of community debts is involved. The court say: Husband and wife have an equal title to community property, her right is

as much a vested right as his, and the wife's half of the community property is hers and her heirs' forever.

Hill *vs.* Young, 7 Wash., 33; 34 Pac. Rep., 144:

The land was acquired (community, with title in husband's name) under the statute of 1869, by which the husband had "like absolute power of disposition as of his separate property." The wife died and the husband subsequently conveyed away the land, no question of community debts being involved. The court holds that it is not necessary to decide whether the husband's right of disposition was a vested right, which could not be taken away by any subsequent statute; and that the husband's right of disposition terminated (even if vested) with the death of the wife, unless the land was his separate property.

Warburton *vs.* White, 176 U. S., 484; 44 L. Ed., 555:

The court holds that the legislature may constitutionally alter the rules of inheritance, descent and distribution as to community property previously acquired (a conceded power of the legislature as to all property), but holds expressly that the doctrine of Spreckels *vs.* Spreckels (cited under IX, *supra*) does not apply, and declines to review or consider it.

XI.

The Community Property Law in the United States.

By an inspection of the foregoing authorities it appears that the doctrine herein contended for by the appellee is supported by decisions of the courts of ultimate jurisdiction

in the States of Louisiana, Texas, California, and Missouri, and in the Territory of New Mexico, and by the decision of this court upon the law of Porto Rico, in all of which jurisdictions the Spanish-Mexican community property law was, as it were, inherited from the old country, and was originally administered according to the principles and doctrines laid down in the laws and juridical treatises of Spain and Mexico. In New Mexico there has been no statute in any manner relating to the point in issue here prior to the statute of 1901, the constitutionality of which is here in question.

On the other hand, it is true that Texas courts have, in more recent times, asserted the doctrine that the wife has an equitable interest in the community property during the subsistence of the matrimony, but it cannot be discovered that this is borne out by the Spanish-Mexican law, which denies to the wife any actual interest in such property during the subsistence of the matrimony. This Texas doctrine may perhaps be accounted for by the modifications of the Spanish-Mexican law contained in the following statutes, which have been in force in that jurisdiction for more than half a century:

Batts' Annotated Civil Statutes of Texas:

Art. 2970. The wife may contract debts for necessaries furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property, and for such debts suit may be brought in the manner prescribed in article 1201.

Art. 2971. Upon the trial of any suit as provided for in the preceding article, if it appear to the satisfaction of the court and jury that the debts so contracted or expenses so

incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the community property or the separate property of the wife, at the discretion of the plaintiff.

Art. 2973. The community property of the husband and wife shall be liable for their debts contracted during marriage, except in such cases as are specially excepted by law.

Art. 1201. The husband and wife shall be jointly sued for all debts contracted by the wife for necessaries furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property.

And in the State of Washington, which has never been Spanish or Mexican territory, the law of community property has always been construed to be "the creature of the statute;" and these Washington statutes, and the Washington courts theorizing upon them with scant reference to the Spanish-Mexican principles and doctrines, have formulated a system of community property law far different from that which prevailed in Mexico and in New Mexico until modified by statute.

XII.

Legal Fictions.

Medieval and later scholasticism was doubtless responsible for the growth of an abundant crop of fictions in the science of law, which the common law has not entirely outgrown. The community property law dates back to the

middle ages, and the wife's ownership of half of the community property during the subsistence of the matrimony was merely a fiction incident to provision for her maintenance and support and for the maintenance and support of her children after the dissolution of the matrimony. It is contrary to all the experience of European history that the nations of southern Europe should, in this particular, have so early established, in fact and law, the dignity and independence of the wife, who was in other respects little more than her husband's chattel during the subsistence of the matrimony. And as little can it be argued that the invading Northmen introduced a law or custom for the wife's protection more liberal than that which prevailed in their own country. The germ of the community law is perhaps found in Caesar's account of the Gauls:

Viri quantas pecunias ab uxoribus dotis nomine acceperunt, tantas ex suis bonis aestimatione facta cum dotibus communicant. Huius omnis pecuniae coniunctim ratio habetur fructusque servantur; uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum temporum pervenit. Viri in uxores sicut in liberos vitae necisque habent potestatem.

Caesar, De Bello Gallico, VI, 19.

It is easy to infer the husband's absolute power of disposal during the subsistence of the matrimony.

On the other hand he says, in VI, 21, that the Germans differ much from this custom. And this is confirmed by another Roman historian of higher authority, who notes as something new and strange that among the Germans the husband brings the dower to the wife:

Dotem non uxor marito, sed uxori maritus offert. Intersunt parentes et propinqui, ac munera probant, munera non ad delicias muliebres quaesita, nec quibus nova nupta comatur; sed boves et frenatum equum et scutum cum framea gladioque. In haec munera uxor accipitur: atque invicem ipsa armorum aliquid viro affert. Hoc maximum vinculum, haec arcana sacra, hoc coniugales deos arbitrantur Ne se mulier extra virtutum cogitationes extraque bellorum casus putet, ipsis incipientis matrimonii auspiciis admonetur, venire se laborum periculorumque sociam, idem in pace, idem in proelio passuram ausuramque Hoc iuncti boves, hoc paratus equus, hoc data arma denuntiant. Sic vivendum, sic pereundum: accipere se, quae liberis inviolata ac digna reddat, quae nurus accipiant, rursusque ad nepotes referant.

Tacitus, De Germania, XVIII.

XIII.

The Wife's Community Property Right is in Effect a Form of Dower.

Although there is in the Spanish-Mexican law frequent mention of the wife's revocable and fictitious ownership and possession of half the community property, often without the qualifying adjectives, a careful examination of this law induces inevitably the conclusion that such ownership is merely a fiction incident to provision for the wife's support and maintenance and for the support and maintenance of her children after the dissolution of the matrimony, of the general nature of the common-law dower.

In Beard *vs.* Knox, 5 Cal., 252; 63 Am. Dec., 127, the court, after saying that the wife's half interest in the com-

munity property has been substituted in place of the common-law right of dower, makes the following illogical and inconsistent statement:

The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, *subject only to the husband's disposal during their joint lives.* This is a present, definite and *certain* interest, which becomes absolute at his death, so that a disposition by devise, which can only attach after the death of the testator, cannot affect it.

But this is mere dictum, for the court decides only that the husband cannot devise more than half of the community property existing at his death, in perfect accord with the rules of the Spanish-Mexican community property law.

It is consistent with the historic character of the nations of southern Europe that their law placed the wife absolutely at the mercy of the husband during the subsistence of the matrimony. And the development of the common-law dower right is equally characteristic of the Anglo-Saxon civilization.

XIV.

Wife's Administration of Community Property During Husband's Absence.

Stress is laid by the appellants on the Texas rule that the wife may administer community property in the continued absence of the husband.

Where the husband is absent, leaving no one to take care of the community property, the wife has the implied authority to do so. Cheek *vs.* Bellows, 17 Tex., 613.

And in case of abandonment she has the power of sale to the extent which may be necessary for the preservation of the property and the support of herself and children. Kelley *vs.* Whitmore, 41 Tex., 648; Zimpleman *vs.* Robb, 63 Tex., 274; Fullerton *vs.* Doyle, 18 Tex., 3; Walker *vs.* Stringfellow, 30 Tex., 570; Bennett *vs.* Montgomery, 22 S. W., 115; Slater *vs.* Neal, 64 Tex., 224; Heidenheimer *vs.* Thomas, 63 Tex., 287; Lodge *vs.* Leverton, 42 Tex., 18.

But such power of sale is limited by necessity. Clements *vs.* Ewing, 71 Tex., 371.

And she has no power to bind the community property for the purchase of lands. Carothers *vs.* McNeese, 43 Tex., 224.

And see also the Texas statutes quoted in paragraph XI, *supra.* This rule arises, under the influence of the statutes last mentioned, from the necessity (knowing no law) which then makes the wife the husband's agent; and the rule may be compared to the common-law liability even of the husband's separate property for necessaries purchased by the wife.

XV.

The Spanish-Mexican Law.

According to this law the husband was, at the time of the treaty of Guadalupe Hidalgo and of the Gadsden purchase, in effect the absolute owner of the community property during the subsistence of the matrimony, but he could not defraud the wife of her expectancy.

Garrozi *vs.* Dastas, 204 U. S., 81; 51 L. Ed., 380:

The court say: When it is considered that the ancient Spanish law confers no authority upon the wife to obtain

a judicial dissolution of the community merely because of the disorder of the husband's affairs, it follows that the power of the husband under the Spanish system is in principle more extensive than it is under the Code Napoleon and the laws of the countries which have followed that code.

Schmidt, Laws of Spain and Mexico, Historical Outline, p. 98:

This author, shortly after the acquisition of California and New Mexico by the United States, writes as follows: Such was the legislation of Spain in force in Mexico on the 16th of September, 1821, when she declared herself independent. Since that period the Mexican Republic has adopted various forms of government, although in the main republican. Such, however, has been the state of confusion, and so numerous have been the revolutions of that interesting country that it has been unable to bestow much attention on the reform of its legislation. The civil law of that country, with some few exceptions, is in point of fact hardly dissimilar from that of Spain.

Schmidt, Laws of Spain and Mexico, Historical Outline, p. 88:

The general legislation of Spain is therefore to be found at this time, 1st, in the *Fuero Juzgo* (7th century); 2d, in the *Fuero Real* (1255); 3d, in the *Siete Partidas* (1348); 4th, in the *Nueva Recopilacion* (1547), and 5th, in the *Novisima Recopilacion* (1805).

Novisima Recopilacion, Libro X, Titulo IV, De los Bienes Gananciales ó Adquiridos en el Matrimonio (the laws of this title are translated in a brief given in Packard *vs.* Arrellanes, 17 Cal., 531):

Law V.—Enacting the laws of the *Fuero* and the contents of the Book of the *Estilo de Corte* and the other laws which provide for the tenure of the property acquired between the husband and wife during the subsistence of the matrimony, I command and ordain that each and all property acquired by military service (*bienes castrenses*) and offices of the King, and gifts which are acquired and improved and held during the subsistence of the matrimony between the husband and wife, by one of them, shall belong to that one who has acquired them, without the other having any part of them, according to the requirement of the said laws of the *Fuero;* but that the fruits and profits of such property and offices, and of all other offices whatsoever, even though they be those offices which the law has held to be quasi-military property (*bienes cuasi castrenses*), and the other property acquired and improved during the subsistence of the matrimony, and the fruits and profits of such military property (*bienes castrenses*) and offices and gifts, shall be the property of both as one; and moreover that, during the subsistence of the matrimony, the husband can, at will, without the permission or license of the wife, alien the property acquired, improved and amassed between husband and wife during the subsistence of the matrimony, provided it be not military property (*bienes castrenses*) nor quasi-military property (*bienes cuasi castrenses*); and that the contract of alienation shall be valid, except it be proved that it was made dishonestly in fraud of the wife.

Now, there are, in the foregoing law and in other similar laws, many expressions which seem to recognize a partnership, even in fact, as existing between the spouses during the subsistence of the matrimony, but the effect of these expressions is practically neutralized by expressions recognizing such partnership only as a fiction, and they are controlled by the effect of express provisions which deny to the wife any actual right or interest in the community property, and clothe the husband with the actual ownership thereof, during that time. The wife's *separate* property is subject to the control and administration of the husband, who accepts or renounces even her inheritances and donations, and of this property he may be considered a trustee or administrator, as contended by appellants.

Schmidt, Laws of Spain and Mexico, art. 40.

Van Maren *vs.* Johnson, 15 Cal., 311.

But the husband is the head of the family and must provide for its wants.

Schmidt, Laws of Spain and Mexico, art. 37.

The husband alone is absolutely liable for the community debts; he alone has the absolute right to dispose of the community property, except as to testamentary disposition, a matter admittedly within the legislative control; he alone has the actual and true dominion of this property, which is liable for his ante-nuptial debts.

Van Maren *vs.* Johnson, 15 Cal., 312.

And thus, during the subsistence of the matrimony, he alone has the *dominio pleno y absoluto* of the community property, which has been defined as "the power which one

has over anything to alienate independently of another, to receive its fruits, to exclude all others from its use."

Justice Swayne, dissenting, in United States *vs.* Castillero, 2 Black, 17; 17 L. Ed., 400.

1 White's New Recop., tit. II, cap. 1 (p. 85).

The law looks to facts and effects, not to expressions.

XVI.

Statutes should not be allowed a retroactive operation, where this is not required by express command or by necessary and unavoidable implication.

Sturges *vs.* Carter, 114 U. S., 519; 29 L. Ed., 243:

The court say: In the case of Society *vs.* Wheeler, 2 Gall., 139, Mr. Justice Story thus defines a retroactive, or as he calls it, a retrospective law: "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

Ingoldsby *vs.* Juan, 12 Cal., 577, 580, 581:

The wife having acquired land before her marriage with the husband, an act, passed after the marriage, gave the husband the management and control of the wife's separate property during the continuance of the marriage and required the husband's joinder in a conveyance of it. In discussing the question whether the wife could, by her sole deed, subsequent to the statute, but made with the knowledge, consent

and concurrence of the husband, convey away the land, the court say: It will be observed that the estate is confessedly in the wife; *her* title it is that is to pass; the joining of the husband is not for the purpose of passing title. It is only as a precaution against imposition, or to afford her his protection, or similar reasons of policy, or to evidence his renunciation of the right to manage or control it. In this case, the contract having been made, and the right of the wife having vested under a different system, it is, to say the least, doubtful whether the legislature could give the husband any power to control or manage such separate property, any more than, if he had it under the old system, the legislature could take it away. But the subject of the act of the seventeenth of April (the act in question) was the separate property itself, and that statute was passed to define and fix the relations of the parties to it; and by the sixth section the husband is made the manager of the separate property of the wife, and the power of sale by him is denied, and the mode of sale fixed; but this only, by obvious rules of construction, applies to separate property afterwards acquired, or to property held as separate by women married after the passage of the act. The legislature had no power to affect marital regulations or rights fixed by law previously; and if they had, we are not to presume, in the absence of an express declaration to that effect, that they so intended.

Nilson *vs.* Sarment, 152 Cal., 524; 96 Pac. R., 315; 126 Am. St. R., 93, 94:

The husband and wife were married in 1877. Land was purchased by the husband and the deed therefor made to the wife in 1884. The wife conveyed away the land by her

sole deed in 1905. In suit by the husband to quiet his title to the land against the grantee in the last mentioned deed, the court say: Sections 162 and 163 of the Civil Code define the separate property of the spouses as that owned by them, respectively, before marriage, and that acquired afterward by gift, bequest, devise or descent. By section 164 all other property acquired after marriage by husband or wife, or both, is declared to be community property. In 1889 this section was amended by the addition of the words: "But whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." Prior to the adoption of this amendment the presumption was just the opposite; that is to say, property conveyed to either husband or wife after marriage, by a conveyance other than a deed of gift, was presumed to have vested the title in the marital community. The property in question was acquired by the Nilsons (or one of them) in 1884. It is thoroughly settled that the amendment of 1889 is not retroactive and has no application to property acquired by husband or wife before its enactment (citing authorities, q. v.). In Jordan *vs.* Fay, 98 Cal., 264, 33 Pac. R., 95, the court, speaking of this amendment, said: "But the rule declared by the statute was more than a rule of evidence; it was a rule of property as well; and we do not think the legislature intended or had the power to change it so that it would be retroactive in effect and disturb titles already vested.

Murray *vs.* Gibson, 15 How., 423; 14 L. Ed., 756.

Potter *vs.* Rio Arriba L. and C. Co., 4 N. M., 661-664:

Plaintiff Potter had contracted to sell to defendant, an alien corporation, land in New Mexico. Subsequently an act of Congress made it illegal for any corporation, not created under the laws of the United States, or of some State or Territory of the United States, to acquire, hold or own land in any Territory of the United States. The court held that the corporation was not prevented from acquiring and holding the legal title.

Finally we submit that the mutual and individual rights of the parties to the community, prior to the statute of 1901, are not to be ascertained by the theories of courts upon recent statutes, largely shaped with a view to the emancipation of woman, in a perhaps more enlightened age and civilization, but are to be sought in the Spanish-Mexican law, in force in New Mexico before and until the statute of 1901, and contained in a multitude of laws of Spain and Mexico, and especially in the treatises of juridical and philosophical writers upon these laws. We contend for a right established and vested by the law and the contract of marriage.

Respectfully submitted,

J. H. PAXTON,

Las Cruces, New Mexico, Attorney for Appellee.

ARNETT *v.* READE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 98. Argued March 14, 1911.—Decided April 3, 1911.

Under the law of New Mexico of 1901, providing that both husband and wife must join in conveyances of real estate acquired during coverture, a deed of the husband in which the wife does not join is ineffectual to convey community property even though acquired prior to the passage of the act.

THE facts are stated in the opinion.

Mr. N. C. Frenger and *Mr. Clifford S. Walton* for appellants:

As to community property, the husband and wife constitute a society, association, partnership or company. The husband is not the sole and absolute owner of community property. *Holyoke* v. *Jackson*, 3 Wash. Ter. 235.

In adopting the community system a State is bound by the principles thereof according to the established rules of the country or State from whence adopted. *Reymond* v. *Newcomb*, 10 N. Mex. 151; *Hill* v. *Young*, 7 Washington, 33; *Warburton* v. *White*, 176 U. S. 484; Ballinger on Comm. Prop., § 255; *Lichty* v. *Lewis*, 63 Fed. Rep. 535; *Mabie* v. *Whittaker*, 10 Washington, 656.

The husband cannot dispose of by will more than half of the community property. *Beard* v. *Knox*, 5 California, 252, 256; *In re Buchanan's Estate*, 8 California, 507; Walton's Civil Law, Art. 1414; *Thompson* v. *Cragg*, 24 Texas, 582; Schmidt's Civil Law of Spain and Mexico, Art. 52.

The law in vesting in the husband the absolute power of disposition of community property designed to facilitate *bona fide* alienation and to prevent clogs by claims of

wife. *Smith* v. *Smith*, 12 California, 217; *DeGodey* v. *DeGodey*, 39 California, 157.

Upon the dissolution of marriage by divorce the wife is entitled to half of the community property. Cases *supra* and *Galland* v. *Galland*, 38 California, 265; Schmidt's Civil Law, Art. 56.

The basis and essence of community property is that the industry and contributions of both spouses create the fund. Cases *supra* and *Meyer* v. *Kinzer*, 12 California, 248; Johnston's Civil Law of Spain, 67; McKay on Comm. Prop., § 168; also Ballinger on Comm. Prop., § 11.

The husband's power to dispose of community property is because he is the head of the community. As soon as he ceases to be the head, as in case of divorce, his power fails.

The term "a mere expectancy" is a term not to be taken literally. The wife's right of dower depends upon whether or not the wife survives the husband, but her right in community property does not. *Galland* v. *Galland*, 38 California, 265.

Under the French law until the marriage is dissolved or the community otherwise terminates, the wife has no right whatever; she has nothing but a mere expectancy. *Dixon* v. *Dixon's Executors*, *infra*.

The admission of counsel for appellee in *Garrozi* v. *Dastas*, 204 U. S. 81, as to a similarity of provisions of the Code Napoleon and the Spanish law prior to the civil code of 1889, as to community property, is apt to be misleading, if not in error.

But the law of community property as known in Spain was not derived from the French or from the Roman law, and under the Spanish law the rights of husband and wife in community property grow out of the marriage contract, and do not originate in its dissolution. Walton's Civil Law in Spain, 32, 42.

Upon the death of the wife her heirs inherit her share of

the community property. An inheritable interest passes. They could not inherit unless their ancestor was owner. *Dixon* v. *Dixon's Executors*, 4 La. 188; *Thompson* v. *Cragg*, 24 Texas, 582; *Crary* v. *Field*, 9 N. Mex. 222; Upton and Jennings' Civil Laws of La., Art. 2392; *Warburton* v. *White*, 176 U. S. 484; *Garrozi* v. *Dastas*, 204 U. S. 64; *Garosi* v. *Garosi*, 1 Porto Rico Fed. Rep. 230; *Aran y Aran* v. *Fritze*, 3 P. R. Fed. Rep. 509; *Martinez* v. *May*, 5 P. R. Fed. Rep. 582; *Scott* v. *Maynard*, Dallam's Decisions (Tex.), 548.

Upon desertion of the husband the wife may administer and sell community property. *Wright* v. *Hays*, 10 Texas, 130; Codigo Civil (Chihuahua), Art. 1903; Civil Code of Mex. Fed. Dist. and Territories, Art. 2031; Walton's Civil Law, Art. 1441; Schmidt's Civil Law, Art. 42; and see *Parker* v. *Chance*, 11 Texas, 513; *Cheek* v. *Bellows*, 17 Texas, 613; *Fullerton* v. *Doyle*, 18 Texas, 4; *Babb* v. *Carroll*, 21 Texas, 765; *Forbes* v. *Moore*, 32 Texas, 196; *Johnson* v. *Harrison*, 48 Texas, 257; *Verimendi* v. *Harrison*, 48 Texas, 531; *Zimpleman* v. *Robb*, 53 Texas, 274; *Caruth* v. *Grigsby*, 57 Texas, 265; *Slater* v. *Neal*, 64 Texas, 222; *Edwards* v. *Brown*, 68 Texas, 329; *Patty* v. *Middleton*, 82 Texas, 586.

The wife may by will dispose of her share of community property. Section 2030, New Mex. Comp. Laws (1897); Pedro Murillo Velarde's Practica de Testamentos; Schmidt's Civil Law, Art. 969; Upton and Jennings' Civil Law of La., Art. 133; Hall's Mexican Law, §§ 2707, 2669, 2671, 2677; Walton's Civil Law, Arts. 1392 *et seq.;* Arts. 1401, 1426, 1433, 1412 *et seq.*, 1435, 1436, 1441.

Not merely by way of analogy, but in fact, the community is a species of partnership. Walton's Civ. Law, Art. 1395; Schmidt's Civil Law, Arts. 43, 58, 728, 729; White's New Recopilacion, p. 60; Johnston's Civil Law of Spain, pp. 67, 69; Upton and Jennings' Civ. Law of La., Art. 2312; Ballinger on Community Property, §§ 5, 88.

Community may be dissolved by confiscation of share of either spouse, but the other spouse is not thereby interfered with in the rights to his or her share. The heirs of deceased spouse and surviving spouse may form a new community. The wife may renounce her community rights. Schmidt's Civil Law of Spain and Mexico.

Upon the death of the husband, the wife is entitled to half of community property not as heir nor through arbitrary divesting from husband, but by virtue of her community right. *Kircher* v. *Murray*, 54 Fed. Rep. 617 (Tex.); Pedro Murillo Velarde, as quoted in 9 N. Mex. 205.

If no issue, upon death of one spouse the other does not inherit, but share of deceased in community property escheats. *Babb* v. *Carroll*, 21 Texas, 765, citing Spanish authorities.

The wife loses her gains in community property if she commits adultery. Absolute ownership means the right to enjoy and dispose of property as one pleases (by testament or otherwise).

Mr. J. H. Paxton for appellee:

The Spanish-Mexican law as to community or acquest property became the law of the Territory of New Mexico from the time of the cession by Mexico, and is still in force in so far as the same has not been modified by statute. *Strong* v. *Eakin*, 11 N. Mex. 113; *Reade* v. *De Lea*, 95 Pac. Rep. 132.

The laws in force where a contract is made and where it is to be performed enter into it and form a part of it as if they were expressly referred to or incorporated in its terms, and this is true of a contract of marriage. *Von Hoffman* v. *Quincy*, 4 How. 535; *McCreary* v. *Davis*, 28 L. R. A. 658; *Gaines* v. *Gaines*, 9 B. Mon. (Ky.) 306; *Dixon* v. *Dixon's Executors*, 4 La. Ann. 188. No State shall pass any law impairing the obligation of contracts. Fed. Const., Art. I, § 10.

The extent of the impairment of the obligations of a contract is immaterial. Whatever legislation diminishes the efficacy impairs the obligation. *Ranger* v. *New Orleans*, 102 U. S. 206.

A vested right means the power to do certain actions or possess certain things according to the laws of the land. *Calder* v. *Bull*, 3 Dall. 394; *Bailey* v. *P. W. & B. R. R. Co.*, 4 Harr. (Del.) 389; *Chicago City Ry. Co.* v. *Chicago*, 142 Fed. Rep. 847; *Mandelbaum* v. *McDonnell*, 29 Michigan, 78.

Under the Spanish-Mexican community property law, in force in New Mexico when the marriage was celebrated and when the land in question in this suit was acquired, the husband acquired said land by an absolute and vested title, during the subsistence of the community, save only that he could not dispose of said land in fraud of his wife's expectancy; and the wife, during the subsistence of the community, acquired no vested interest or title in or to said land, but only a revocable and fictitious ownership or a mere expectancy. Escriche, Diccionario Razonada de Legislacion y Jurisprudencia, tom. II, p. 86 (Bienes Gananciales); Febrero, Bk. 1, chap. 4, paragraph 1, Nos. 29 and 30; Tapia on Febrero, vol. 1, chap. 8, §§ 17 and 20; Schmidt's Civil Law of Spain and Mexico, Art. 51 (quoted in Ball., Comm. Prop., p. 396); Ballinger on Community Property, §§ 5, 6; *Barnett* v. *Barnett*, 9 N. Mex. 213, 214; *Hagerty* v. *Harwell*, 16 Texas, 665, 666.

There is no restraint on the power of the husband to alienate a portion of the community property after suit for divorce begun unless such alienation is made with a fraudulent view of injuring the rights of the wife. *Meyer* v. *Kinzer*, 12 California, 247; and see *People* v. *Swalm*, 80 California, 46; *Greiner* v. *Greiner*, 58 California, 119; *Spreckels* v. *Spreckels*, 116 California, 339; *Guice* v. *Lawrence*, 2 La. Ann. 226.

The provisions of our Code on the same subject are the

embodiment of those of the Spanish law, without any change. The wife's interest is a mere expectancy, like the interest an heir possesses in the property of the ancestor. *Van Maren* v. *Johnson*, 15 California, 312; *Packard* v. *Arellanes*, 17 California, 539. Where the marriage is dissolved by the death of the wife her descendants succeed to the interest to which she would otherwise be entitled. They do not, however, succeed to such interest as a portion of her estate, but because it is vested in them by the statute. *Garrozi* v. *Dastas*, 204 U. S. 79; *Reade* v. *De Lea*, 95 Pac. Rep. 131.

Under the Spanish-Mexican law the wife is neither a necessary nor a proper party to a suit involving title to community property. Consequently she has no legal or equitable vested interest therein. The title must vest somewhere. Where but in the husband? *Althof* v. *Conheim*, 38 California, 230; *Jergens* v. *Schiele*, 61 Texas, 255; *Bofil* v. *Fisher*, 3 Rich. Eq. (S. Car.) 1. All persons immediately interested, or who may be benefited or injured by a decree, should be made parties to a suit. *Bent* v. *Maxwell L. G. & Ry. Co.*, 3 N. Mex. 244; *Mandelbaum* v. *McDonnell*, 29 Michigan, 78.

No State shall make or enforce any law which shall deprive any person of property without due process of law. Fed. Const., Amendment XIV.

The marriage having been contracted under the Spanish-Mexican law, the husband's right to dispose of the community property cannot be taken away or impaired, as to property already acquired, by a statute enacted subsequently to the acquisition of the property and the vesting of the right. *Spreckels* v. *Spreckels*, 116 California, 339; *Moreau* v. *Detchemendy*, 18 Missouri, 526; *Maynard* v. *Hill*, 125 U. S. 206; *Westervelt* v. *Gregg*, 12 N. Y. 205; *Sutton* v. *Askew*, 66 N. Car. 172; Cooley, Const. Lim., 7th ed., 513. The husband's tenancy by the curtesy initiate is a vested right, not subject to legislative

interference. *Rose* v. *Rose*, 104 Kentucky, 48; *Gladney* v. *Sydnor*, 172 Missouri, 318; *Huber* v. *Merkel*, 117 Wisconsin, 355.

As to the statutory doctrine of the State of Washington, see Hill's Wash. Stat., § 1402; Ballinger, Comm. Prop., 372, 373; and as to right of wife to hold property and maintain action, see Hill's Wash. Stat., §§ 1399, 1400; Ballinger, Comm. Prop., 371, 372; *Brotton* v. *Langert*, 1 Washington, 78, 82; *S. C.* 23 Pac. Rep. 688; *Littell* v. *Miller*, 3 Washington, 280; *Holyoke* v. *Jackson*, 3 Washington, 235; *Mabie* v. *Whittaker*, 39 Pac. Rep. 172; *Hill* v. *Young*, 7 Washington, 33, 34; *Warburton* v. *White*, 176 U. S. 484.

The wife's community property right is in effect a form of dower. *Beard* v. *Knox*, 5 California, 252. As to the wife's administration of community property during husband's absence, see *Cheek* v. *Bellows*, 17 Texas, 613; *Kelley* v. *Whitmore*, 41 Texas, 648; *Zimpleman* v. *Robb*, 63 Texas, 274; *Fullerton* v. *Doyle*, 18 Texas, 3; *Walker* v. *Stringfellow*, 30 Texas, 570; *Bennett* v. *Montgomery*, 22 S. W. Rep. 115; *Slater* v. *Neal*, 64 Texas, 224; *Heidenheimer* v. *Thomas*, 63 Texas, 287; *Lodge* v. *Leverton*, 42 Texas, 18; *Clements* v. *Ewing*, 71 Texas, 371; *Carothers* v. *McNeese*, 43 Texas, 224.

According to the Spanish law the husband was, at the time of the treaty of Guadalupe-Hidalgo and of the Gadsden purchase, in effect the absolute owner of the community property during the subsistence of the matrimony, but he could not defraud the wife of her expectancy. *Garrozi* v. *Dastas*, 204 U. S. 81; Schmidt, Laws of Spain and Mexico, 87, 98; and see as to general legislation of Spain, Fuero Juzgo (7th century); Fuero Real (1255); Siete Partidas (1348); Nueva Recopilacion (1547); Novisima Recopilacion (1805); and see also *Van Maren* v. *Johnson*, 15 California, 311; Justice Swayne, dissenting, in *United States* v. *Castillero*, 2 Black, 17; 1 White's New Recop., Tit. II, Cap. 1 (p. 85).

Statutes should not be allowed a retroactive operation, where this is not required by express command or by necessary and unavoidable implication. *Ingoldsby* v. *Juan*, 12 California, 577; *Nilson* v. *Sarment*, 153 California, 524; *Jordan* v. *Fay*, 98 California, 264; *Murray* v. *Gibson*, 15 How. 423; *Potter* v. *Rio Arriba L. & C. Co.*, 4 N. Mex. 661, 664.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to quiet title brought by the appellee against the widow of Adolpho Lea, for whom her heirs were substituted upon her decease. Adolpho Lea married in 1857. He bought the land in question in 1889 and 1893 and it became community property. In 1902 he sold it to the appellee, shortly before his death in the same year, his wife not joining in the conveyance. By the laws of New Mexico of 1901, c. 62, § 6, (a) "neither husband nor wife shall convey, mortgage, incumber or dispose of any real estate or legal or equitable interest therein acquired during coverture by onerous title unless both join in the execution thereof." The courts of New Mexico gave judgment for the plaintiff on the ground that the husband had vested rights that would be taken away if the statute were allowed to apply to land previously acquired; citing *Guice* v. *Lawrence*, 2 La. Ann. 226, *Spreckels* v. *Spreckels*, 116 California, 339, etc. The defendants appealed to this court.

There was some suggestion at the argument that the husband acquired from his marriage rights by contract that could not be impaired, but of course there is nothing in that, even if it appeared, as it does not, that the parties were married in New Mexico, then being domiciled there. *Maynard* v. *Hill*, 125 U. S. 190, 210 *et seq.; Baker* v. *Kilgore*, 145 U. S. 487, 490, 491. The Supreme Court does not put its decision upon that ground, but upon the notion

that during the joint lives the husband was in substance the owner, the wife having a mere expectancy, and that the old saying was true that community is a partnership which begins only at its end. We do not perceive how this statement of the wife's position can be reconciled with the old law of New Mexico embraced in §§ 2030, 2031 of the Compiled Laws, 1897, referred to in the dissenting opinion of Abbott, A. J., that after payment of the common debts, the deduction of the survivor's separate property and his half of the acquest property, and subject to the payment of the debts of the decedent, the remainder of the acquest property and the separate estate of the decedent shall constitute the body of the estate for descent and distribution, and in the absence of a will shall descend, one-fourth to the surviving husband, etc. For if the wife had a mere possibility, it would seem that whatever went to the husband from her so-called half would not descend from her, but merely would continue his. The statement also directly contradicts the conception of the community system expressed in *Warburton* v. *White*, 176 U. S. 484, 494, that the control was given to the husband, "not because he was the exclusive owner, but because by law he was created the agent of community." And notwithstanding the citation in *Garrozi* v. *Dastas*, 204 U. S. 64, of some of the passages and dicta from authors and cases most relied upon by the court below, we think it plain that there was no intent in that decision to deny or qualify the expression quoted from *Warburton* v. *White*. See *Garrozi* v. *Dastas*, 204 U. S. 78. Los bienes que han marido y muger que son de ambos por medio. Novisima Recopilacion, Book 10, Title 4, Law 4.

It is not necessary to go very deeply into the precise nature of the wife's interest during marriage. The discussion has fed the flame of juridical controversy for many years. The notion that the husband is the true owner is said to represent the tendency of the French

customs. 2 Brissaud, Hist. du Droit Franç. 1699, n. 1. The notion may have been helped by the subjection of the woman to marital power; 6 Laferrière, Hist. du Droit Franç. 365; Schmidt, Civil Law of Spain and Mexico, Arts. 40, 51; and in this country by confusion between the practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like *dominio*. See *United States* v. *Castillero*, 2 Black, 1, 227. However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband. Novisima Recopilacion, Book 10, Title 4, Law 5. Schmidt, Civil Law of Spain and Mexico, Art. 51. *Garrozi* v. *Dastas*, 204 U. S. 64, 78. We should require more than a reference to *Randall* v. *Krieger*, 23 Wall. 137, as to the power of the legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States. But whether it could or not, it has not tried to destroy it, but, on the contrary, to protect it. And as she was protected against fraud already, we can conceive no reason why the legislation could not make that protection more effectual by requiring her concurrence in her husband's deed of the land.

Judgment reversed.

Mr. Justice McKenna, dissenting.

I dissent from the opinion and judgment of the court for the reasons set forth in the opinion of the Supreme Court of New Mexico. See also *Spreckels* v. *Spreckels*, 116 California, 339.